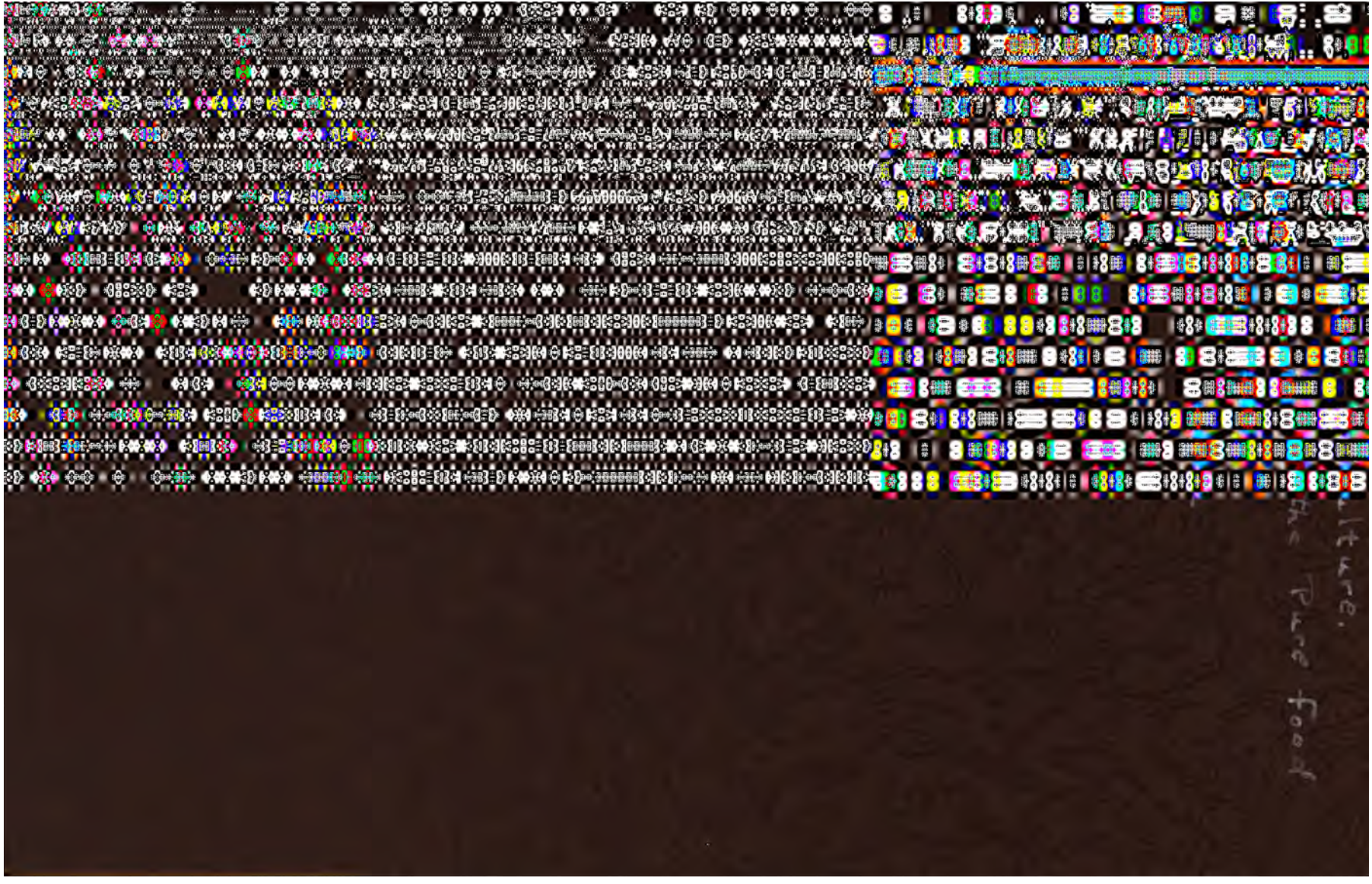

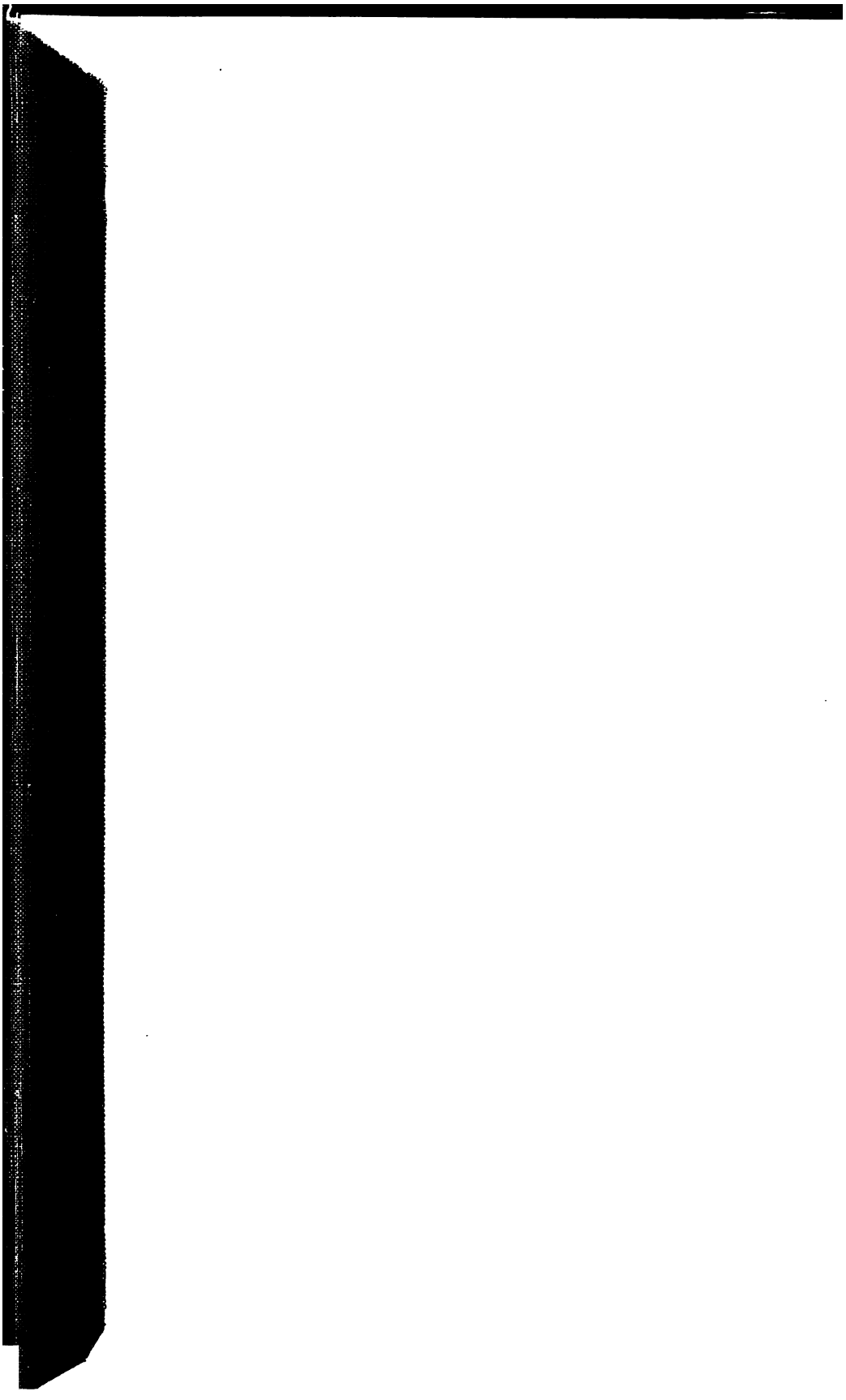

AMENDMENTS TO THE PURE FOOD AND DRUGS ACT

HEARINGS

BEFORE THE

COMMITTEE ON AGRICULTURE

HOUSE OF REPRESENTATIVES

SIXTY-SIXTH CONGRESS

FIRST SESSION

ON

H. R. 8954

OCTOBER 27-28, 1919

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AMENDMENTS TO THE PURE FOOD AND DRUGS ACT.

COMMITTEE ON AGRICULTURE,
HOUSE OF REPRESENTATIVES,
Washinton, D. C., Monday, October 27, 1919.

The committee this day met, Hon. Gilbert N. Haugen (chairman) presiding.

The CHAIRMAN. The committee will come to order. The committee has been called together this morning for the purpose of considering amendments to the food and drugs act, more especially those having for their object the protection of the public against deception in regard to the matter of the appearance of packages and containers.

The chair lays before the committee for its consideration H. R. 8954, which is as follows:

[H. R. 8954, Sixty-sixth Congress, first session.]

A BILL To further amend section 8 of an act entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June 30, 1906, and amended by the act approved March 3, 1913.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8 of an act entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June 30, 1906, and amended by the act of March 3, 1913, be, and the same is hereby, amended in the following particulars:

By adding in said section 8, after paragraph 3 in the case of food, the following paragraph:

"Fourth. If in package form and irrespective of whether or not the quantity of the contents be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count as provided in the preceding paragraph, the package, with guilty intent and for fraudulent purposes, be not filled with the food it purports to contain: *Provided, however,* That reasonable variations and tolerances shall be established by rules and regulations made in accordance with the provisions of section 3 of this act."

In the paragraph heretofore designated "fourth," in the case of food, of said section 8, by striking out the word "Fourth" at the beginning of said paragraph and inserting in lieu thereof the word "Fifth," so that, when amended, said paragraph will read:

"Fifth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided,* That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"(1) In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

"(2) In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term 'blend' as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding."

In said section 8, at the end of paragraph 2, in the case of food, by striking out the period, inserting in lieu thereof a semicolon, and adding the following clause: "or if it be in a container purposely and fraudulently and with guilty intent made, formed, or shaped so as to deceive or mislead the purchaser as to quantity, quality, size, kind, or origin of the food therein," so that said paragraph 2 will, when amended, read as follows:

"Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, of acetanilide, or any derivative or preparation of any of such substances contained therein; or if it be in a container made, formed, or shaped so as to deceive or mislead the purchaser as to quantity, quality, size, kind, or origin of the food therein."

For the convenience of the committee, the pure food and drugs act will be inserted in the printed hearings.

THE FOOD AND DRUGS ACT, JUNE 30, 1906, AS AMENDED AUGUST 23, 1912.

AN ACT For preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That is shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed $500 or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than $1,000 or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court

SEC. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, and such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdeameanor, and for such offense be fined not exceeding $200 for the first offense, and upon conviction for each subsequent offense not exceeding $300 or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided*, That article shall be deemed misbranded or adulterated within the provisions this act when intended for export to any foreign country and prepared or

packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this act.

SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

SEC. 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture or under the direction and supervision of such bureau for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination under the oath of such officer. After judgment of the court notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay for the enforcement of the penalties as in such case herein provided.

SEC. 6. That the term "drug" as used in this act shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term "food" as used herein shall include all articles used for food, drink, confectionery, or condiment by man or other animals whether simple, mixed, or compound.

SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated:

In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or harcotic drug.

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically or by maceration in water or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal or one that has died otherwise than by slaughter.

SEC. 8. That the term "misbranded" as used herein shall apply to all drugs or articles of food or articles which enter into the composition of food the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein which is false and fraudulent.

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third.[1] If in package form the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however*, That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this act.

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[1] The act of March 3, 1913, provides that no penalty of fine, imprisonment, or confiscation shall be enforced for any violation of its provisions as to domestic products prepared or foreign products imported prior to 18 months after its passage.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingedient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

SEC. 9. That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act designating it. Said guaranty, to afford protection, shall contain the name and address of the party making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties which would attach, in due course, to the dealer under the provisions of this act.

SEC. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however*, That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this act, or the laws of any State, Territory, District, or insular possessions, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

SEC. 11. The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be

refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee.

SEC. 12. That the term "Territory" as used in this act shall include the insular possessions of the United States. The word "person" as used in this act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society or association as well as that of the person.

SEC. 13. That this act shall be in force and effect from and after the 1st day of January, 1907.

Approved June 30, 1906.

The CHAIRMAN. A number of communications concerning the bill have been received. I will incorporate extracts from them in the printed hearings. The Department of Agriculture communications state that two types of fraudulent package have come to the attention of the department in the course of its administration of this act.

The first type is that commonly known as the "slack-filled package," frequently used in the marketing of spices, pepper, and other condiments, oatmeal, rice, macaroni, and like articles. These packages are partly filled with food, in some instances to but one-third of their true capacity. They are designed to mislead the consumer as to the quantity of food purchased and to exact from him a price based on the apparent rather than the true quantity of the article thus packaged. This type of package not only tends to the deception of the consumer but to promote unfair competition, since that portion of the trade dealing with honestly filled packages of food is detrimentally affected by the competition of the package which is slack filled.

While it is true that these packages usually are marked in some manner with a statement of the quantity of contents in conformity with the provisions of the net-weight amendment to section 8 of the Federal food and drugs act (37 Stat. 732), purchasers are nevertheless deceived because they rely on the appearance and size of the package to indicate the quantity of food contained therein, and where the discrepancy between the size of the package and the amount of food contained therein is so great the marking of the weight is an insufficient means of apprising the purchaser as to the actual amount of food purchased.

The second type of fraudulent package which, in the opinion of the department, should be dealt with by way of further amendment to the food and drugs act is that which is contrived to give the purchaser a false impression as to the quantity, quality, size, kind, or origin of the food contained therein. This type may be instanced by the following examples: Bottles with inverted bottoms designed to falsely indicate a greater quantity of food than is actually present; bottles made of thickened glass for olives, preserved whole cherries, and strawberries, especially designed to magnify the size of the individual olive or fruit and to conceal, in the case of olives, the interstices between each, thus giving to the consumer a false indication both as to the quality and amount of the contents.

The suggested amendments were based upon information developed by the department in the course of its administration of the net-weight provisions of

the food and drugs act, which shows that certain forms of package food, notably spices, condiments and cereals, are often marketed in containers which are only half filled; that certain canned foods contain an excess of liquid such as water or syrup, and a deficiency of food material. These deceptive packages afford a convenient vehicle for covert increases in the cost of food articles to the consumer.

While the present provisions of the food and drugs act do not reach this form of deception, the general purpose and structure of this statute is such that with slight amendment its provisions could be readily extended so as to include within the definition of misbranding all forms of deceptive food packages.

We have with us this morning a number who desire to be heard on the bill. There are representatives here of the Department of Agriculture, the National Wholesale Grocers' Association, the Bottle Blowers' Association, the Flavoring Extract Association, National Confectioners' Association, Spice Manufacturers, and several attorneys who I believe desire to be heard.

The committee will first hear the representatives of the Department of Agriculture. Mr. Horigan, the committee will be pleased to hear you.

STATEMENT OF MR. JAMES B. HORIGAN, ASSISTANT TO THE SOLICITOR, DEPARTMENT OF AGRICULTURE, WASHINGTON, D. C.

Mr. HORIGAN. Mr. Chairman and gentlemen of the committee, I have examined the bill, and I will give just a brief outline of it, because necessarily there has been included, in order to make it dovetail into the rest of the food and drugs act, some repetitions and reenactment of parts of the act as it now stands. In the pamphlet copy of the food and drugs act, if you will follow that, gentlemen, the text of the present food and drugs act of June 30, 1906, with the present amendments in it, begins at page 19.

On page 20 you will find, in about the third or fourth paragraph, section 8, of the act, which deals with the misbranding of foods, that contains the pertinent provisions of the act, and it contains several subparagraphs. Paragraph 3 is what is known as the Gould amendment, passed March 3, 1913, and it deals with food in package form, and requires that the net weight of the contents be stated on food in package form, and we have added a paragraph after that in the proposed bill, in order to compel the filling of slack-filled packages. The bill, as drawn, adds, after paragraph 3, as it now stands, paragraph 4, which is to the effect that if in package form, and irrespective of whether or not the quantity of the contents be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count as provided in the Gould amendment, the package be not filled with the food it purports to contain, provided that reasonable variations and tolerances may be established by rules and regulations made in accordance with the provisions of section 3 of the present food and drugs act.

Mr. ANDERSON. Does that now refer to weight, quantity, or character?

Mr. HORIGAN. This refers merely to the compelling of the package to be filled to its true capacity, allowing for reasonable variations and tolerances, as the amendment proposes.

Mr. ANDERSON. There is a very grave doubt whether it does that all or not. It is not clear whether the word " food " there relates the quantity, character, or weight.

Mr. HORIGAN. It merely requires that the package be filled with t food. That refers back, of course. It is by way of an addition the present act, and if you will notice section 8, on page 20, stai out, " That an article of food shall be deemed to be misbranded " a this will be deemed to be misbranded under the food and drugs a if it is not filled with the food its purports to contain.

Mr. ANDERSON. Does that mean the kind of food, the quantity food, or the number of pieces?

Mr. HORIGAN. It means the quantity. It must be filled to its tr capacity with the quantity of food it purports to contain; that if it purports to be tomatoes, it should be filled with tomatoes; if purports to be fish, it should be filled with fish, allowing for reaso able variations for certain empty space.

Mr. PURNELL. Suppose it looks like a quart package but on contains a pint in it, and so states on the container?

Mr. HORIGAN. That is precisely the situation we are dealing wit gentlemen. We want to get such packages as that.

Mr. MCKINLEY. What he said was, suppose it is a quart, and it only marked a pint?

Mr. HORIGAN. If a quart represents its true capacity, I should sa that it should be filled to its true capacity, less reasonable variatio and tolerances; in other words, reasonably full.

Mr. MCKINLEY. In other words, you could have a quart space th was marked that it only contained a pint?

Mr. HORIGAN. Well, that would be, of course, true marking, b would still be deceptive to the consumer.

Mr. MCKINLEY. But is that what you are proposing to prevent

Mr. HORIGAN. We propose to prevent a package of a large capacity from being slack filled.

Mr. MCKINLEY. But that would not be slack filled, if it says it onl contains a pint.

Mr. HORIGAN. It would be slack filled, irrespective of the stat ment, if it was a quart package and contained but a pint.

Mr. MCLAUGHLIN of Michigan. Suppose the label says there only a pint there, then there is no misrepresentation.

Mr. HORIGAN. Dr. Alsberg will deal with the reasons and motive for the bill. I find this situation occurs, that, psychologically, th size of the package outweighs in the minds of purchasers the stat ment of the quantity of contents, which is a thing that is more o less inconspicuous, while the size is a very conspicuous thing. think you will find, when you examine containers, that deception do result, notwithstanding the quantity is marked on them, in compli ance with the law as it now stands.

Mr. YOUNG. I have been getting a great many letters lately, mainl from candy people who have been considered as not filling thei containers, in the nature of propaganda against this measure. I wa just wondering why we were getting all those letters from thes candy people.

Mr. HORIGAN. I can not say as to that.

The CHAIRMAN. Thank you, Mr. Horigan. I believe Dr. Alsberg desires to make a statement next. We will be pleased to hear you, Dr. Alsberg.

STATEMENT OF MR. CARL L. ALSBERG, CHIEF BUREAU OF CHEMISTRY, DEPARTMENT OF AGRICULTURE.

Mr. ALSBERG. Here is a candy box with a false bottom (marked (1)).

Mr. MCLAUGHLIN of Michigan. Is that the condition in which that was sold?

Mr. ALSBERG. Yes, sir; that is a false bottom under there. This, of course, is not a false bottom. That false bottom is about half an inch above the bottom.

Mr. YOUNG. I want to ask a question in that connection. If they see fit to put in a false bottom—what is that supposed to be, a pound or half a pound?

Mr. ALSBERG. A pound.

Mr. YOUNG. If it really contains a pound, there is no objection to their having a false bottom in the box, is there?

Mr. ALSBERG. Yes, sir; there is.

Mr. YOUNG. I want to ask this question: Does the person who buys a box of that kind, with a false bottom, as a matter of fact, consider the shape of the box or just the number of pounds?

Mr. ALSBERG. That depends. Some people put out a full pound in a box like that and label it a pound, and some people put out 15 ounces and label it 15 ounces. Our experience under the food and drug act has been that the consumer compares packages by their size and, other things being equal, a man who puts out a pound in a large box gets an unfair advantage over his competitor who puts out a pound in an honest sized or shaped box, and the consumer pays him more than he is entitled to in actual practice.

But there are, Mr. Chairman—if I might take this discussion up at this time—two propositions herein involved. The one is the proposition of the slack filling of packages, and the other is the proposition of the deceptive shape or appearance of a package.

Now, the situation with respect to the slack filling of packages became particularly acute during the war, because the price of a great many articles went up, and had to go up, particularly where the articles were imported from abroad and the amount of the article imported, or the available quantity of that imported into this country, was lessened. It therefore became difficult for a good many people in a good many lines to fill the packages which formerly they had been filling. You would think the normal thing for them to do would be to get a smaller package and fill that, but they did not do that, or, at least, those that wanted to could not get away with it, because the other fellow would not. So they took to the slack filling of packages, and this practice was particularly bad with reference to spices, which are sold in 5 and 10 cent packages.

The practice of slack filling was by no means unusual before the war. The war merely compelled even honest manufacturers to resort to it. Now that general trade conditions are returning to normal the practice of slack filling and similar practices have by

no means disappeared, and there is every reason to fear that the force of competition is such as to force the continuance of this practice permanently if Congress takes no action.

There was at one period of the war packages of spices on the market that should contain 2 ounces, but actually contained half an ounce, or less than 1 ounce, and when you consider that some of the packages of this type have a perforated shaker cover that you can not open you can see what the deception amounted to. These all represent different types of slack-filled packages.

Here is a very good example. This package contains 2 ounces, and this one contains 4 ounces (marked (2)).

The CHAIRMAN. The same size?

Mr. ALSBERG. You can see the size.

The CHAIRMAN. They are nearly the same size, are they not?

Mr. ALSBERG. There is a slight difference. You see what the average woman, when she goes into the store, will do. If this package which contains 4 ounces costs more than this package which contains 2 ounces, she is going to buy the 2-ounce package, and pay more in proportion for the 2-ounce package than she does for the 4-ounce package. That is the practical way it works out, and our experience has been that no amount of marking is going to take care of the situation.

Mr. PURNELL. Of course the net weight is stated on both packages?

Mr. ALSBERG. Not in this particular case, and I will give you the reason for it. When the original Gould amendment was passed it gave the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of the Treasury, who were to make rules and regulations, the authority to exempt small packages. It was believed that a package might be so small that there was not any sense in marking it, and the secretaries fixed the exemption at 2 ounces or less. As a result this package, being an old one, is not marked, while this is marked. Because of the situation which arose during the war the Secretary of Agriculture asked the three secretaries to agree to change the exemption, so at the present time it is lowered to half an ounce, and if this package were now put out on the market it would have to be marked as containing 2 ounces. It is not marked, for the reason that it was put out before the exemption was changed. It was formerly not believed that any deception was possible in a package of 2 ounces or less, because it is so small a package.

The CHAIRMAN. Is the package containing 2 ounces half filled or quarter filled?

Mr. ALSBERG. It is about half filled. There is an economic aspect to this. A can of this size costs about 2 cents or thereabouts—perhaps a cent and a half. It is a waste of tin plate, and it takes more shipping space, and it is economically a vicious proposition.

The CHAIRMAN. The large container is used for the purpose of deceiving the consumer?

Mr. ALSBERG. Abosolutely so. Then there is another type of deception, and that is the matter of the false bottom. Here is a sample (marked (1)). This type of package with the false bottom was brought to our attention by the food commissioner of the State of Virginia, who writes this letter to Dr. Abbott. Dr. Abbott is one of the men in the Bureau of Chemistry.

COMMONWEALTH OF VIRGINIA.
DAIRY AND FOOD DIVISION.
Richmond, Va., October 17, 1919.

Dr. J. S. ABBOTT,
Chemist in Charge, Bureau of Chemistry.
Washington, D. C.

DEAR MR. ABBOTT: I am inclosing under separate cover an empty candy package put out by the Touraine Co., Boston, Mass., and which when partly filled with candy is being distributed through the United Cigar Stores in this State.

An examination of this package in our laboratory shows that the weight of the goods is 15 15/16 ounces, practically meeting the claimed weight.

The total cubic space in box with the false bottoms removed is 64.16 cubic inches; the cubic space with the false bottoms in place is 49.08 cubic inches, and the cubic space as used by our local confectioners is 40 cubic inches for a pound box of candy.

Approximately 25 per cent of the available space in the box put out by the Tourane Co. is occupied by a false bottom, which I think gives a deceptive appearance to the package.

Bearing in mind the views taken on partly filled packages, and the law which includes within the meaning of misbranding "a package the design of which is false or misleading in any particular." I submit that the form (size) of the package referred to is "misbranded," and I would be pleased to be advised the view you take in this case.

Yours, truly,

BENJ. L. PURCEL, *Commissioner.*

In other words, he would like to have us prosecute under the food and drugs act, on the theory that the shape of the package constitutes a misbranding. The solicitor of the department has ruled that the law, as it is at present, is not susceptible of the interpretation which the food commissioner of the State of Virginia desires to have placed upon it.

Mr. PURNELL. Let me ask you in that connection, is it not a fact that a lot of this extra space as taken up in these so-called fancy boxes of candy is used for trimming?

Mr. ALSBERG. That is often true, but this happens to be one in which you could not claim that, and there are a good many such.

Mr. WILSON. Let me ask you about this bottom. Do you know what the contents were in that box?

Mr. ALSBERG. 15 15/16 ounces, practically 1 pound.

Mr. PURNELL. It is correctly labeled 1 pound, except that it lacks a sixteenth of an ounce?

Mr. ALSBERG. It is correctly labeled, but if you hand a purchaser two boxes side by side, the purchaser will take the larger box. That may seem stupid or foolish, but that is the way it works out in practice.

THE CHAIRMAN. Will you kindly state by percentages the shortage in each package, so that it may appear in the record.

Mr. ALSBERG. I will do that. Here is another package that came in last week (marked (3)). This is the type of complaint we are receiving from the public. This letter is by Willis P. Hopkins, of 1725 Wilson Avenue, Chicago. I do not know who he is, but he writes under date of October 18, as follows:

I am to-day mailing you, per parcel post, a can of pepper purchased by me on 17th instant in a Piggly Wiggly store at 1122 Wilson Avenue, Chicago. The can bears a label, "Three fourths ounce net weight," and when the pepper was purchased the weight was three-fourths of an ounce, as stated on the label, but you will notice the can is proper size to hold double the quantity contained therein. This can was purchased by me as a result of the enclosed advertise-

ment, from which I quote: "Full 1 ounce tin, 5 cents." When I bought this can I supposed it was full.

I call your attention to this package and the advertisement because you will notice the product is manufactured in Cincinnati and was transported to Illinois; hence it traveled in interstate commerce and you apparently have jurisdiction.

Here is the letter; here is the advertisement, and here is the can. It is just a letter we picked out at random. We are getting that type of complaint.

Then another thing that we hope to meet with this bill is this matter of the deceptive bottle, and here are some photographs which illustrate deceptive bottles (marked (4)). Here are some flavoring extract bottles (marked (5)). This bottle contains 2 ounces and this bottle contains 1⅞ ounces, which leads to deception, even though the quantity is marked on the label.

The CHAIRMAN. Which is the larger bottle?

Mr. ALSBERG. This apparently is the larger, but this contains the more material. This, of course covers the second of the two propositions which are dealt with in the bill. One is the slack filling, and the other is the deceptive shape or appearance of a package.

The CHAIRMAN. Judging from appearance, the bottle having the smaller capacity would seem to contain more than the other.

Mr. ALSBERG. This one contains 2 ounces, and this one contains 1⅞ ounces. You mean in appearance it seems to?

The CHAIRMAN. Yes; in appearance.

Mr. ALSBERG. Yes, sir.

The CHAIRMAN. In other words, it has been made in such a way that it appears to contain much more than its true capacity?

Mr. ALSBERG. Yes, sir; apparently; and these are by no means extreme cases.

Mr. PURNELL. Does it cost more to make the large bottle?

Mr. ALSBERG. It costs, I believe, more to make the large bottle. There is only one thing that it is fair to state in that connection, and that is that the large bottle is commonly made by hand, and the small bottle is made by machine.

Mr. JACOWAY. There is quite a difference of expense, if that is so.

Mr. ALSBERG. Of course, that will redound ultimately to the benefit of the consumer.

Mr. JACOWAY. That is, if he supplies the machine-made bottle, but if he supplies the hand-made bottle it does not.

Mr. ALSBERG. The machine-made bottle is cheaper, and the small bottle of uniform shape can be made on a machine. I do not know whether this was actually so made, but the large bottle has to be made by hand. Here are some samples of slack filled packages (marked (6), (7), (8), (9), (10), (11), (12), (13), (14), and (15)). This paper shows the extent to which the package is filled. It was filled up to here.

The CHAIRMAN. Will you give the percentages?

Mr. ALSBERG. We will have to put that in afterwards. We have not figured it out. It was filled up from the bottom to the point of the lower edge of the white paper.

The CHAIRMAN. In other words, one-third filled?

Mr. ALSBERG. Something like that. It contains 2 ounces.

Mr. WILSON. About one-third?

Mr. ALSBERG. That is right. Here is one that contained macaroni, which was filled up to here (marker (7)).

Mr. YOUNG. Has it the weight marked on it?

Mr. ALSBERG. The weight is correctly stated on the outside. Here is another sample.

Mr. WILSON. Is this all that was in this?

Mr. ALSBERG. Yes, sir.

Mr. WILSON. It looks like somebody took some of the contents out of it.

Mr. ALSBERG. Yes; but that was all that was in it.

Mr. MCLAUGHLIN of Michigan. For the record, Doctor, I think you ought to make a different statement. We can see these different packages as they are handed around, but it would be very——

Mr. ALSBERG. It would be very difficult for me to make a statement here, but I can fix up the record.

Mr. MCLAUGHLIN of Michigan. I think there would be no objection to putting it in the record so it would clearly appear to the reader of the hearing.

The CHAIRMAN. Without objection, it will be so ordered. You may complete the record by inserting at this point in the printed reports of the hearings a statement showing the percentage the various exhibits are filled, and such other information as may be of interest concerning the exhibits which you have submitted to the committee.

(The statement referred to by the chairman follows:)

EXHIBIT OF SLACK-FILLED AND DECEPTIVE PACKAGES OF FOOD PRODUCTS SUBMITTED IN CONNECTION WITH THE HEARING ON H. R. 8954 BEFORE THE HOUSE AGRICULTURAL COMMITTEE.

This exhibit has been selected from three sources:

1. Samples collected by our inspectors as appearing deceptive to them and referred to the bureau for any action which might be taken under the food and drugs act in its present form.

2. Samples found by competitors and referred to the bureau for redress and relief.

3. Samples referred to the bureau by individuals who felt that they were being deceived.

The sources, viz, bureau inspectors, business men, and private individuals, show the scope of the deception which is illustrated by this exhibit.

The packages were exhibited in the order of the numbers on them. They are grouped below to illustrate two points, (1) slack filling, (2) deceptive packages.

1. SLACK-FILLED PACKAGES.

These cartons bear a paper sticker which shows the amount of unfilled portion when they contain the amount of food declared on the label. These exhibits show the variety of products in which and the amount to which slack filling is practiced:

Exhibit No. 6. One spaghetti carton, labeled and containing 7 ounces, one-third full.

Exhibit No. 7. One macaroni carton, labeled and containing 7 ounces, two-thirds full.

Exhibit No. 8. One noodle carton, labeled and containing 2 ounces, one-third full.

Exhibit No. 15. One potato-chip carton, labeled and containing 3 ounces, one-half full.

Exhibit No. 9. One pepper can, labeled and containing 2¼ ounces, two-thirds full.

Exhibit No. 10. One pepper can labeled and containing three-fourths ounce, one-fourth full.

Exhibit No. 12. One pepper carton labeled and containing three-fourths ounce, one-third full.

Exhibit No. 11. One tea carton labeled and containing 2 ounces, two-thirds full.

Exhibit No. 13. One nutmeg can labeled and containing one-half ounce, one-third full.

Exhibit No. 14. One coconut carton labeled and containing 2 ounces, two-thirds full.

Exhibit No. 16. One pickling-spice carton with window pane, filled just to top of window.

Exhibit No. 17. One mustard-seed carton with window pane, filled just to top of window.

3. One pepper can labeled three-fourths ounce, accompanied by a newspaper advertisement advertising this package as containing 1 ounce, and also a letter of complaint in regard to the package.

These exhibits illustrate slack filling by comparison with a full package:

Exhibit No. 2. Two pepper cans, both same size, one labeled 2 ounces, the other labeled 4 ounces.

Exhibit No. 18. Two cinnamon cartons, both same size, one labeled 1½ ounces, the other labeled 2 ounces.

Exhibit No. 19. One nutmeg can labeled 1 ounce and one mustard can labeled 3½ ounces, both same size.

Exhibit No. 24. Two coffee and chicory cartons, one labeled 1 pound and the other labeled 14 ounces, both same size and sold by same firm.

Exhibit No. 20. One cinnamon carton used for both 1½ and 2 ounces by one firm.

Exhibit No. 23. One Jiffy-Jell carton labeled 3½ ounces in black print with 2 ounces stamped over the 3½, showing a reduction of declaration of contents without a reduction in size of package.

2. DECEPTIVE PACKAGES.

Exhibit No. 1. One candy box labeled 1 pound; has false bottom which occupies 25 per cent of the total capacity of the box.

Exhibit No. 21. One pepper carton labeled three-fourths ounce, contains three-fourths ounce pepper wrapped in a large amount of heavy paper.

Exhibit No. 22. One food dessert carton; contains a large amount of heavy paper in which the product was wrapped to help to fill carton.

Exhibit No. 25. One ginger-snap package; both ends of the package are "set in" three-fourths to 1 inch.

Exhibit No. 26. One marshmallow carton with "raised bottom."

Exhibit No. 27. One Fernet-Brance bottle with raised bottom; contains 28 ounces; without the raised bottom would contain 30 ounces.

Exhibit No. 29. One olive bottle; has the appearance of a column of globes; has a magnifying effect on the contents.

Exhibit No. 4. Five sheets of photographs of bottles showing how the capacity of bottles is decreased by increasing the weight.

Exhibit No. 5. Four bottles on a cardboard; two panel bottles containing 1½ and 2 ounces; appear to be twice as large as plain bottles containing 2 ounces.

Mr. McKINLEY. Where does it show on this package what is in it (marked "7")?

Mr. ALSBERG. On the top, there.

Mr. McKINLEY. That is the net weight, 7 ounces?

Mr. ALSBERG. Yes.

The CHAIRMAN. The fact is that the purchaser seldom ascertains the contents, but judges by the appearance?

Mr. ALSBERG. Here is another type of open-faced package (marked "16" and "17"). They were careful to fill it up just beyond the window, but not beyond that.

Mr. ALSBERG. Here are two other samples (marked "24"), one package containing a pound and one 14 ounces. Here is our old friend, the bottle with the dimpled bottom, only this happens to an unusually large one (marked "27").

The CHAIRMAN. What is deceptive about that bottle?

Mr. ALSBERG. It has a dimple in it larger than necessary.

The CHAIRMAN. How much will that bottle hold?

Mr. ALSBERG. It is a 28-ounce bottle, and it should be, of course, a quart, which is 30 or 32 ounces.

Mr. WILSON. Is that some foreign production?

Mr. ALSBERG. No; it is an imitation of a foreign production.

Here is another type which is of a little different character. This is an olive bottle (marked "29"). If you fill that olive bottle with water, and put olives in it, it has a lense effect, and you think you have a much larger sized olive in the bottle than you get. It looks as though you have a large-sized olive, where, as a matter of fact, you have perhaps a medium-sized olive. Also these indentations here prevent the olives from slipping down, so you can not get very many olives in the bottle, because the indentations prevent it.

Mr. YOUNG. How largely is that slack filling of over-sized packages practiced in the trade?

Mr. ALSBERG. During the war, sir, in certain trades, it was universal. They were all confronted with this situation in certain lines. They had 5-cent and 10-cent packages, and they wanted to retain the 5-cent and 10-cent package. Nobody felt that he alone could make a beginning and reduce the size of the package, so they all slack filled.

Mr. MCKINLEY. Doctor, that is about the size of an ordinary so-called quart bottle, like a whisky bottle or a wine bottle (marked "27")?

Mr. ALSBERG. That depends, of course. Some are full quarts; most of them are one-fifth of a gallon, which is 25⅗ ounces. The ordinary whisky bottle contains one-fifth of a gallon, or 25⅗ ounces. If it is marked a full quart, it has to be a full quart; but the ordinary bottles are 25⅗ ounces, which is one-fifth of a gallon. They are either marked 25 ounces, or one-fifth of a gallon. They are never marked a quart.

The CHAIRMAN. How many ounces does this bottle contain? Does it contain a full quart?

Mr. ALSBERG. No, sir; 28 ounces. A quart bottle would be 4 ounces more.

The CHAIRMAN. If it was not for the indentations, it would contain a quart?

Mr. ALSBERG. Yes, pretty nearly; not quite.

As a matter of comparison, we have here a full ounce and a 3½-ounce mustard can, both having the same volume. (Marked (19).)

There are two things that we want to achieve. One is that the package be reasonably full, recognizing, of course, that certain types of packages can not be made absolutely full. You can not make these shaker packages absolutely full, otherwise they will not shake. The other thing is that the package will not be deceptive in appearance through a false bottom or a false top, or a wrong shape. These are the two things we want to achieve.

Mr. MCLAUGHLIN of Michigan. In the case of these bottles with the red liquor (marked (5)), it seems to me the trouble is due to the form, shape, and style of the bottles.

Mr. ALSBERG. The language in this bill is supposed to cover that also, sir; it is at the bottom of page 3, "Or if it be in a container made, formed, or shaped so as to deceive or mislead the purchaser as to quantity, quality, size, kind, or origin of the food therein." That language is supposed to cover that particular point.

Mr. JACOWAY. If this bill as drawn is passed, you will get the results that you desire.

Mr. ALSBERG. We thought so, sir.

Mr. JACOWAY. You have gone over it with care?

Mr. ALSBERG. Yes. Of course, I am not an attorney, but we thought it would, sir.

Mr. JACOWAY. I understand.

Mr. MCLAUGHLIN of Michigan. What has the Federal Trade Commission to do with this? I have received a large number of letters, evidently from one source, and each one mentions the Federal Trade Commission as having power to protect the consumer against deception, and so on.

Mr. ALSBERG. I do not know what authority the Federal Trade Commission has to protect the consumer.

Mr. MCLAUGHLIN of Michigan. What are they doing—what authority are they assuming?

Mr. ALSBERG. I do not know, sir. I do not know anything about that. I have no knowledge of anything they have done on this particular point. There is, of course, a specific law which preceded the establishment of the Federal Trade Commission, and that is the food and drugs act.

Mr. ANDERSON. These people are suggesting, I think Doctor, that there is no need of this legislation because the Federal Trade Commission has the power to prevent this now.

Mr. ALSBERG. I can not say as to that, sir, and I have no knowledge that the Federal Trade Commission has taken any steps in that direction. I have been told by one or two manufacturers that they had placed a specific case before them. From all I know, nothing has been done.

Mr. CANDLER. I have received a number of these letters, and everybody else has. This one says:

> This bill, we believe, is entirely unnecessary, inasmuch as the food and drug act gives the Federal Trade Commission ample power to protect consumers against misrepresentations and deceptions in food products in packages.
>
> The Federal Trade Commission has authority to make investigations, and its decisions are remedial and preventative rather than penal and corrective.
>
> We, are, therefore opposed to this bill, and we trust that you too, will do whatever possible to prevent its becoming law.

I get that kind of letter in every mail. This one came this morning. I presume every other member has received them. They are all from the same source, because they are all in the same language. They are all inspired by propaganda against the bill.

Mr. ALSBERG. I do not know much about the operations of the Federal Trade Commission, but my understanding of their operations is that they are to prevent unfair competition between individual manufacturers. As a rule, if they prevent unfair competition between manufacturers, they will also prevent deception of the consumer, but not necessarily so. The fact is that I have no knowledge that they have taken this matter up. We already have a law

which covers food. It would be much simpler, it strikes me, if similar matters relating to food were handled by the same authority.

Mr. CANDLER. There is one thing about these letters that I have received. Each one comes from a candy man, and they speak about the beautiful boxes they make.

Mr. ALSBERG. I judge it must be because they put out a very great variety of packages.

Mr. RUBEY. Have we any State laws along the same line?

Mr. ALSBERG. I have no knowledge of any State laws of this kind. The State laws, as far as I know, are all similar to the food and drugs act as it now is.

Mr. WILSON. These packages are all from different trades, are they not?

Mr. ALSBERG. Yes, sir; picked up in the open market.

Mr. WILSON. These are all you could find?

Mr. ALSBERG. Oh, no.

Mr. WILSON. There are great quantities, I suppose?

Mr. ALSBERG. Yes; great quantities of them. This is only a tenth of what we happen to have in the Bureau of Chemistry right at the present moment.

Mr. JACOWAY. Could you put in the record all the different articles of food of every kind that the public is deceived on? You say this is about a tenth. Could you make an enumeration of them and put them in the record?

Mr. ALSBERG. We could make a very long list. I could not guarantee they would include everything. The list would simply include other articles and other brands, but would not present anything of interest that is not here before you.

Mr. JACOWAY. I mean, what you have. You say this is a tenth of them.

Mr. WILSON. I would make a list of these articles and the manufacturers of them. I think they ought to be advertised a little, if they can.

Mr. ALSBERG. We have always gone on the theory, in the enforcement of the food and drugs act, that we had no basis on which to advertise a man unless he had his day in court. We publish after the case has been tried. I agree that they ought to have advertisement, but the department has not followed that policy.

Mr. MCLAUGHLIN of Michigan. Doctor, has your attention been called to the fact or claim made by these dealers that the Federal Trade Commission handles the matter?

Mr. ALSBERG. This morning, sir, is the first time that was brought to my attention.

Mr. MCLAUGHLIN of Michigan. Have you learned in any way that the Federal Trade Commission had authority or was assuming authority?

Mr. ALSBERG. I have no information on the subject, sir: I had not learned it.

Mr. MCLAUGHLIN of Michigan. Was there no communication with them at all about it?

Mr. ALSBERG. I have had no communication with them; no, sir.

Mr. MCLAUGHLIN of Michigan. Your bureau?

Mr. ALSBERG. No, sir; we have not communicated with them on the matter. It never occurred to us, and they have not communicated with us.

Mr. MCLAUGHLIN of Michigan. There may be authority vested in the Federal Trade Commission, and this may be a duplication here. Of course, this budget system we are going to have is going to cure all kinds of duplication; at least, that is the claim.

Mr. ALSBERG. Of course, the enactment of this legislation would not involve any additional expenditure, because it would be thrown in with the regular enforcing of the food and drugs act.

Mr. CANDLER. Your object, under this proposed bill, is simply to secure protection of the public by having manufacturers and producers furnish to the public an honest package, honest weight, and of honest size and appearance, so that the public will not be deceived?

Mr. ALSBERG. That is the object, sir.

Mr. CANDLER. So they will get absolutely what they profess to sell them and what they want to buy.

Mr. ALSBERG. Yes, sir; that is the object.

Mr. MCLAUGHLIN of Michigan. How far do you go beyond the interstate commerce proposition? When a company has trade that extends into another State, do you assume authority over the entire trade, intrastate as well as interstate?

Mr. ALSBERG. No, sir; we have no authority to interfere with traffic intrastate. Our only way of getting at them is through cooperation with the local authorities, the State food officer whom we notify that this practice exists. He may take action under his own law, but we have no jurisdiction.

Mr. MCLAUGHLIN of Michigan. Then, if this bill is adopted and made a part of the law, you can not in any way reach a dealer who has trade that is entirely within one State?

Mr. ALSBERG. We could not, sir. There are dealers, or have been dealers, who put up two or three types of packages, or had two complete lines, one of them for sale in the State, and one outside of the State.

Mr. MCLAUGHLIN of Michigan. Do you find the material different in those two places of doing business?

Mr. ALSBERG. There have been dealers whose State product was very largely adulterated, and whose interstate shipments were not.

Mr. JACOWAY. Also as to the weight of the package?

Mr. ALSBERG. Yes, sir; that is also true, sir.

Mr. MCLAUGHLIN of Michigan. Have you found a difference between the containers that are used for intrastate and interstate business by one company?

Mr. ALSBERG. We have not found that, because we have not felt that we have the authority to control these particular abuses. Under the law, as it now exists, there is no object in attempting to change the package.

Mr. MCLAUGHLIN of Michigan. I did not know but what, in your examination, you had found a dealer who was doing both intrastate and interstate business, using different kinds of packages and filling them differently.

Mr. ALSBERG. Well, I believe recently that has happened in one or wo States where the local officer interpreted his law as preventing

these abuses. I believe you stopped these abuses, Mr. Newman, or some of them, in your own State, did you not?

Mr. NEWMAN. In some of them.

Mr. ALSBERG. Mr. Newman is the commissioner of the State of Illinois, and he had authority to stop some of these abuses, when we did not have authority, his law being a little different. He has stopped them, but certain types of slack filling that have been eliminated in Illinois are still going on in interstate commerce.

Mr. MCKINLEY. I notice in one of these letters that they make the statement that they have on hand now packages of one size to the amount of $100,000. If this law was passed would you expect to help those people out?

Mr. ALSBERG. Well, of course, that is for Congress to say whether they want to give them time or whether they want an interval to elapse before the law should be effective or not. Personally, I do not quite see why a man who has devised a package which was conceived in fraud should be permitted to continue to use it, particularly as the bulk of these packages represent packages which are not necessarily fraudulent, but which would become honest if they were properly filled.

Mr. MCKINLEY. A great many of these candy men state that they have equipment and holiday packages which are larger than necessary. This is a letter from a candy man. He says he has $100,000 worth of packages.

Mr. MCLAUGHLIN of Michigan. Here is a letter from a man who says he has on hand fancy boxes and packages which do not conform to the strictest economy as to size, for the very reason that they are used for gift packages, and the manner in which they are packed adds as much to their acceptability as the contents.

Mr. ALSBERG. Well, I do not see why a man who has put a false bottom into a fancy box should be permitted to continue to do it. I think there might be some provision made for a fancy box, possibly, but I do not see why he should continue to use a fraudulent one.

Mr. MCKINLEY. You have only reported on one that has a false bottom.

Mr. ALSBERG. Well, there are more of them.

Mr. MCLAUGHLIN of Michigan. There is some advantage in the concave bottom, is there not?

Mr. ALSBERG. You mean in the bottle?

Mr. MCLAUGHLIN of Michigan. Well, the bottle or the box. Is not this a protection to the contents, not to have the entire bottom exposed to the surface on which it stands?

Mr. ALSBERG. Yes, sir; and, of course, under the rules and regulations which would have to be made there must be provision for just that sort of thing. This should not, however, permit a man to take advantage of the fact that there is a legitimate reason for not having the bottom flat, so he would not put a bottom a half an inch or three-quarters of an inch above the real bottom, when the legitimate distance would be a quarter of an inch.

Mr. PURNELL. Can not these offenses be reached under the food and drugs act?

Mr. ALSBERG. The attorneys of the department advise us that we have not authority to reach them under the law as it now is. You

might think that under the misbranding clause of the food and drugs act, which says that an article is misbranded if it bear any false or misleading statement, design, or device, you could get them, but if they have the contents correctly stated, then you would have to interpret the law as meaning that the shape, size, or appearance of the package is a design or device. Now, the attorneys have held that the misbranding refers to the label and not to the size, shape, appearance, or dress of the package.

Mr. PURNELL. But the act says, "If the package containing it, or its label, shall bear any statement, design, or device"; that is to say, if the package containing it shall bear any design.

Mr. ALSBERG. You would have to interpret the package as being a design, you see, and the law only says bear.

Mr. PURNELL. Bear on the package?

Mr. ALSBERG. Is not that the package itself? We have tried to persuade ourselves that we could interpret it that way, but we have not been able to do it.

Mr. PURNELL. That would have to be construed to mean that the package would have to carry a design or device on it that would be deceptive.

Mr. ALSBERG. Yes, sir; that is the way we feel we would have to construe it.

Mr. JACOWAY. Doctor, if they put on a package any statement, design, or price that was misleading, under the law, they would be indicted, and you would have sufficient authority to prosecute them?

Mr. ALSBERG. We have done it many times.

Mr. JACOWAY. Wherein does this differ from the old law and the old amendment?

Mr. ALSBERG. It differs in this, that under the law as it is the package must bear that design or device. This will declare it to be misbranded if shape or container itself be deceptive. The attorneys have felt that the misleading design must be on the package, and that under the present act it could not be applied to the package itself. That is the essential thought, to get around that word "bear," which was used in the law, before this was foreseen. I do not know whether I have made myself clear.

Mr. JACOWAY. Yes, you have.

Mr. MCLAUGHLIN of Michigan. It is suggested in some of these letters that the proviso as to variations and tolerances is not mandatory. It does read, "That reasonable variations and tolerances may be established by rules and regulations." The writer of one letter suggested that that ought to be mandatory, and that the department should be required to establish rules and regulations as to variations and tolerances. What do you think about that?

Mr. ALSBERG. I do not think that the department has any particular objection to that change in the language. The thought in our minds was this, that if it is mandatory to establish tolerances, it is mandatory to publish them, and when we publish a tolerance it means that it ceases to become a tolerance but becomes a practice. If we say that a tolerance in a certain type of bottle shall be half an ounce in the 12-ounce bottle, because that is reasonable, you will give the very skillful manufacturer a prescription of which he might take advantage. We thought it might be better not to make it mandatory,

but to leave it to administrative judgment, because if you publish a tolerance, it is taken advantage of. That is a question for Congress. We have not any very strong feeling on the subject.

Mr. McLAUGHLIN of Michigan. As you operate under this law now, in many instances, I suppose you take no notice of variations and tolerances until a case arises, and then you determine at that time whether or not a certain tolerance is reasonable or proper and such as you would have made if it had been called to your attention, or if you had thought it advisable?

Mr. ALSBERG. The way we are operating at the present time, which requires a good deal of work, is that we are working through the whole series of foods and studying the methods of packing them, and the types of packages. We are determining what are reasonable variations in size, according to good, commercial practice, because you can not make 100 packages and have them all exactly alike. We are studying what is reasonable according to good, commercial practice, in filling by hand and by machinery, to determine what is a reasonable tolerance, and what is reasonable shrinkage and variations.

We are systematically going through all classes of food and drugs.

Mr. McLAUGHLIN of Michigan. You do not check them up by regulation in the first instance, but determine it when the case arises?

Mr. ALSBERG. Yes; we try to anticipate all cases. We try to find out in advance, and that is essentially how we operate.

Mr. McLAUGHLIN of Michigan. It is up to your department, and it is more or less arbitrary whether it is done in the first instance, or later?

Mr. ALSBERG. Yes, sir; but we have no strong feeling on the matter. If it is your judgment that it had better be made mandatory we will publish a set of regulations.

Mr. McLAUGHLIN of Michigan. I see force in what you say; that it would be a sort of invitation to them to reduce the quantity or quality, or something of that kind.

Mr. ALSBERG. A little bit. That was the only reason we used slightly different language, but we have no strong feeling on the subject.

Mr. JACOWAY. I want to ask you this: Would it be practicable to have all manufacturers of food articles in some way make application to some department of the Government, say the Agricultural Department, stating they were going into the manufacture of a certain article, and setting forth in their application a statement of the kind of container it was going to be wrapped in, the exact contents that will be contained in the container, and the exact statement that will be upon the package, so that when the department sees that they will know whether they are complying with the law or trying to evade it? Would that be too voluminous not to be practical or would it be practical to have some kind of law providing that manufacturers of these different articles shall perform certain conditions precedent before they enter into the manufacture of food articles?

Mr. ALSBERG. You mean that the Department of Agriculture would be required to approve labels?

Mr. JACOWAY. Yes, sir.

Mr. ALSBERG. Well, that could be done only where such simple matters as a statement of weight and things like that are involved.

Where statements of quality and purity are involved, it would mean we would have to have an organization very similar to the organization of the Bureau of Animal Industry for meat inspection. If they put "U. S. inspected and passed" on all food articles, they would either take advantage of that or else we would have to have inspectors placed in the factories, which would be a very expensive proposition. It would cost a lot of money and would require the extension of our present organization. If you wanted to apply it merely to such questions as we have here, such as the size of the package, the statement of the net weight, where questions of health, of sanitation, and of quality are not involved, it would not be such a big job; but if you want it for all phases of the food and drugs act, there would have to be an extension of our organization in the department, and we would have to have hundreds of inspectors, instead of 45, as we have at the present time.

Mr. McKINLEY. Does that question that he asks come under the authority of the Federal Trade Commission?

Mr. ALSBERG. I am not very familiar with that. I do not think so.

Mr. McKINLEY. Have you got a lawyer here?

Mr. HORIGAN. I would say that did not come under the Federal Trade Commission act, sir. The Federal Trade Commission act, if I understand it, was an act to regulate unfair competition among manufacturers. I am not a specialist in that law, but we deal particularly with the misbranding of food and drugs shipped in interstate commerce, dealing with the commodity or article itself, and we think the unfair practice part of it comes in there as merely incidental to the purpose of the food and drugs act. The main purpose of the food and drugs act is to see that the article of food goes to the consumer pure and properly labeled as to contents, so as to prevent him from being deceived when he buys it.

Mr. PURNELL. May I ask you a question before you finish? I have here 14 letters I have received in the last day or two in opposition to this bill, most of them from candy manufacturers, and I think, without a single exception, each letter contains this general statement, that the Federal Trade Commission has ample power to protect the consumer against deceptions of this character, and it is far better to leave the adjudication of such questions to the commission, with full authority to make investigations, and whose decisions are of a remedial and preventive character, instead of a penal and corrective.

These candy manufacturers who have written in here opposing this bill all state that the Federal Trade Commission has got authority to reach these deceptions, and that therefore there is no necessity for this amendment.

Mr. HORIGAN. I should say that that is purely a question of policy, whether they are right or not, whether they are reached or not, but I feel that this fraudulent package that goes to the consumer is within the purview of the character of deceptions which are now denounced by the present food and drugs act. I should say that the Federal Trade Commission approaches it from the standpoint whether one manufacturer is getting a better price on his article than another by reason of the style and dress of the packages. I feel that the Federal Trade Commission is not directly concerned with the consumer. It

is possible that our acts may overlap to some degree, but that will not prevent the Federal Trade Commission from operating, but in this case it is a more effective weapon in our hands as an administrative proposition, when we are dealing with the misbranding of food and drugs, that we clean up entirely in the Department of Agriculture.

Mr. PURNELL. Your idea, then, is that the Federal Trade Commission is more interested in seeing that justice is done as among manufacturers?

Mr. HORIGAN. As between manufacturers.

Mr. PURNELL. Do you know whether or not it really undertakes to exercise that authority, if it has it?

Mr. HORIGAN. I have no knowledge except that in my following of the Federal Trade Commission act to some extent, I know that they have taken up questions of misbranding in the way of trade names, and things like that. I have not seen them go into the proposition of weight, etc., and the question of misrepresentation of the character of food.

Mr. PURNELL. This amendment, if adopted, will protect the consumer, rather than have any regard for the right of the manufacturers?

Mr. HORIGAN. Yes.

Mr. MCLAUGHLIN of Michigan. We might put in here that it is to be enforced by the Department of Agriculture, and not by the Federal Trade Commission. Evidently, if all the manufacurers should perpetrate the same fraud, if you might call it that, and each was taking some advantage of the consumer, the Federal Trade Commission would pay no attention to it?

Mr. HORIGAN. That thought occurred to me, that if the manufacturers would agree to the same practice, so that there would be no discrimination among the manufacturers, the consumer would be left out in the cold just the same.

Mr. PURNELL. How would the consumer be injured if they all resorted to the same practice?

Mr. HORIGAN. As Senator Sherman said on the floor, he went in to buy a package of rice, and bought a package that looked like 2 pounds, but he really got about a pound of rice. A member of my family went into a store and bought some macaroni, and thought she was getting something, and got this slack-filled package and she felt very much hurt about it.

Mr. PURNELL. But if all the manufacturers resorted to the same practice——

Mr. MCLAUGHLIN of Michigan. It would mean that all the consumers would be defrauded.

Mr. PURNELL. Would they be defrauded?

Mr. WILSON. They would be deceived.

Mr. PURNELL. They might be deceived, but if there was no incentive, by reason of the difference in size, one would be in the same situation as the other.

Mr. ALSBERG. There is an economic waste involved.

Mr. WILSON. But that does not go to the question of deception and fraud; that goes to the question of economic waste in the packages and the space taken up in shipping.

Mr. McLAUGHLIN of Michigan. It does involve fraud and deception, because the purchaser has no way of knowing how nearly filled the package is standing before you, and he has the right to assume that it is practically full, and it is not.

Mr. PURNELL. I do not want to get into an argument as to whether or not he is defrauded. I can not see any possible chance for him to be defrauded, when he gets 16 ounces or 15 ounces.

Mr. JACOWAY. When he thinks he is getting 18 ounces?

Mr. McLAUGHLIN of Michigan. How many purchasers know how much space an ounce of plunder will take?

Mr. HORIGAN. Possibly Mr. Wilson's point is this, that if all manufacturers were to agree on an honest package there would be no inducing motive to practice deception on the consumer, since manufacturers would not then be forced to meet the unfair competition of the dishonest package. On the other hand, were they all to agree on a dishonest package, there would then be no question of unfair competition as between manufacturers, but the consumer might in that event nevertheless be deceived by a slack-filled package.

Mr. PURNELL. I do not think anybody is fooled unless one fellow has more slack than another.

The CHAIRMAN. In other words, in the matter of counterfeiting, if all are engaged in the same business, that would not be considered fraud or deception?

Doctor, there has been a good deal of complaint about the forms of packages or containers used in the selling of sirup. What have you on that? Have you got that matter under investigation?

Mr. ALSBERG. I do not recall any cases in which the deception on packages of sirup was any different from this general type. I do not recall any instances which would set that class of goods aside by itself, unless it be those cases in which the shape of the package is such as to indicate to the purchaser that the product is maple sirup when in fact it is not.

Mr. McLAUGHLIN of Michigan. Have you had this matter up with the manufacturers and had hearings and conferences with them?

Mr. ALSBERG. This general proposition?

Mr. McLAUGHLIN of Michigan. Yes.

Mr. ALSBERG. Yes; we had it up with the spice people. We started a few prosecutions during the war against the spice manufacturers who happened to have their cans labeled in a way that we thought we could make a case. There were certain spice manufacturers who had the packages labeled "5-cent package" and "10-cent package." We made a case against them on the theory that the words "5-cent package," or the statement "5-cent package," or "10-cent package," had acquired a definite meaning, because of the fact that it had meant a certain amount of spice. They reduced the amount of spice in the package but still called it a 5-cent package, and therefore we considered that package was misbranded. The cases did not come to trial because the entire trade came down and we had hearings and the trade said very frankly they thought something ought to be done, but that they could not do it by themselves because they could not control everybody.

That is the history of all these conditions. The trade does not want to do these deceptive things, but some man starts, and the whole

trade is disorganized, and then they are all compelled unwillingly to follow. Now, as a rule, if you give them a chance to get out from under unfair competition they are only too glad to quit. My understanding is that the spice trade, the wholesale-grocers' trade, and the canners all have expressed themselves as in favor of this bill, if it can be amended or changed so as to make the establishment of tolerances compulsory instead of optional, and, in the case of the spice association, if they be given a suitable length of time to dispose of the packages which they already have on hand.

Mr. JACOWAY. That is interesting to the committee. Is it your idea that the reputable trades want this legislation adopted?

Mr. ALSBERG. My understanding is that is true for the reputable trade among the spice dealers, the canners, and the wholesale grocers, and there are probably others who have not happened to communicate with me. I understand that the reputable trade in those three lines wants this legislation, if the establishment of tolerances is made compulsory instead of optional, and if, in the case of the spice dealers, they to be given time to adjust themselves.

Mr. MCKINLEY. Doctor, on the latter question, what would your recommendation be as to the time the bill or law should take effect after it is passed?

Mr. ALSBERG. Well, if it is the judgment of the committee, sir, that you want to make it effective at some later date, I would not be in a position to recommend a specific date without communicating with the trade. I do not know how large a stock of cartons and similar packages the trade has on hand.

If it were merely a matter of labels, and you wanted to give them a chance to use up their labels, which is a case we have had to deal with, you would have to give them 18 months. That was our experience on labels, because labels are articles that if you buy them by the million you get them for an enormously reduced price.

Mr. PURNELL. As a matter of fact, do not many of these concerns place their orders for packages and labels a year in advance?

Mr. ALSBERG. I do not know about packages, but I do know about labels. They buy labels in enormous quantities. I am not in a position to make a recommendation at this session, without a conference with the trade, on the package question. If it is a matter of labels and you would want to give everybody a chance to clean up, you would have to let them have 18 months.

Mr. MCKINLEY. How are we to find out?

Mr. ALSBERG. We have gentlemen representing the trade here who will be glad to inform you, and if you want us to make an investigation, our inspectors can easily check up and find out how much the trade has on hand. We have not done that. I think if this committee wanted to find out we could set our inspectors to work.

Mr. YOUNG. Personally, I have not very much sympathy with extending the time to get rid of a fraudulent device. I have not any sympathy with that proposition at all.

Mr. MCKINLEY. They are not all fraudulent. This covers a good many.

Mr. WILSON. Here is a package put out by a Chicago concern, which looks like it held a bushel of potato chips, when you look at it, but when you open it you find it is about a third full. Now, I think

that the quicker we get that package off of the market the better the public will be served, and as far as I am concerned, I would not give that concern any leeway whatever to dispose of what they have got. That is the way I look at it.

Mr. McKINLEY. I understand that; but when you have taken an extreme case.

Mr. ALSBERG. You could perhaps pass some language which would make an exception of the candy manufacturers.

The CHAIRMAN. At present you do not care to express an opinion as to the time required to dispose of the stock on hand? I take it that that should be taken care of should it not?

Mr. ALSBERG. Not at this time, sir; because I have no information.

Mr. JACOWAY. All these fellows have got to do is this, that is to fill up the packages, is it not?

Mr. ALSBERG. That is true; but Mr. McKinley is thinking of the man who has candy fancy boxed, you see, for the holiday trade.

Mr. RUBEY. There is not much danger of his being disturbed before the coming holidays.

Mr. PURNELL. I think there is a decided difference between a man who puts a false bottom in a package and the man, who, because he wants to make a nice package that will sell, trims it, as a fancy-candy box, is trimmed inside and out. That fellow clearly intended to deceive somebody by putting that false bottom in there, but the average dealer who puts a paper container in there for his candy, and who makes a gift package that sells more on account of the box than for the contents, stands in a different position.

Mr. ALSBERG. There would not be any disposition on the part of the administrative officers to favor that kind of a man. We have to use our judgment in applying a specific proposition. As a matter of fact, that is the type of thing we have to do in the administration of the law every day.

If we sent everything to prosecution we would soon bring the law into disrepute in the courts. The courts would very soon not give us any attention, if we brought all kinds of trivial questions into the courts. So we have to use our judgment in the matter.

There is just one other class of goods I wanted to mention in this connection, which I overlooked before, and that is canned goods, in which great abuses have and to some extent still are being practiced in slack filling. A can is sealed, and a woman can not open it before she buys it. She takes it home before it is opened. The statement on the outside of the can of how much is in it means nothing to the average woman, because she does not know whether the can should hold a pound, 2 pounds, or 5 pounds. She knows how much a pound of dried beans ought to be, but she does not know what a pound of cooked pork and beans represents, and so, unless she has for comparison two or three cans, with different statements of weight on them, the weight means very little to her. The condition is particularly difficult, because most of these canned goods are mixtures of food and liquor. Take peas, sauerkraut, or spinach——

Mr. JACOWAY. How about tomatoes?

Mr. ALSBERG. As it happens, with tomatoes the liquor has the same food value as the solids, and the family eats the whole can

contents. So long as the tomatoes are not adulterated with water, it makes very little difference. We have tried to prevent abuses in the filling up of empty space with liquor under the adulteration provisions of the act. In the case of most goods that are put in cans, the can has to be filled; otherwise it can not be sterilized, and it will not keep. You either burn it or do not destroy the bacteria, and it afterwards sours or blows up. We have been able to get at a good deal of the abuse under the charge of adulteration. If a man puts fruits into cans, fills the interstices with water, but does not put the proper amount of fruit into the can, and then states the actual amount that he puts in on the label, we have succeeded in prosecuting on the theory that the goods have been adulterated with water, but there are a great many cases in which we can not do that.

Take the case of shrimp put up in cans. Shrimp are put into a can and the spaces between the individual pieces of shrimp are, of course, not filled with solids. We could hardly charge the shrimp packers with adulteration with air.

Now, this particular phraseology, we believe, will give authority to say that the can is as full as good commercial practice in the production of the article demands. I think I can say that the canners to whom I have spoken and their officers are in favor of this legislation, because you can get at an element of the trade that they are fighting themselves, the cut-throat competition from the men who slack fill, and who are a serious menace to the canning industry.

Take the case of spinach. That is another example. You can take one can of spinach and another can of the same size and they will vary. The same-sized can, a No. 2 can, will vary from 16 to 31 ounces. The same-sized can will vary in the amount of spinach from 16 to 31 ounces. The jobber sometimes tells the canner what price he wants to pay a dozen for the spinach, and the canner, of course, puts as much spinach into the can as he can afford to put into it at that price. The rest of it is filled up with water.

It is a matter of how much the jobber is willing to pay per case.

Now, the price at which it is sold to the consumer, the reduction is not in proportion to the reduction in the cost of production. Somehow or other the reduced cost in production in a considerable measure is absorbed very largely somewhere along the line between the producer and the consumer.

The CHAIRMAN. The cans were put up in accordance with a special measure?

Dr. ALSBERG. Not always, sir.

The CHAIRMAN. They put in a certain amount of spinach and then add liquid?

Dr. ALSBERG. Exactly, sir.

The CHAIRMAN. I believe we have a number of gentlemen here from outside the city who desire to be heard.

Mr. THOMAS E. LANNEN. I am an attornev for the National Confectioners' Association. I would like to ask Dr. Alsberg a few questions, if I may.

Doctor, have you any knowledge as to the condition in which this package was when it was purchased with the candy in it?

Dr. ALSBERG. What do you mean?

Mr. LANNEN. I am referring now to a package you said had a false bottom in it.

Dr. ALSBERG. Yes, sir. Well, I didn't purchase it personally.

Mr. LANNEN. You don't know how the candy was in this box at the time, you did not purchase it?

Dr. ALSBERG. No; I do not.

Mr. LANNEN. As a matter of fact, do you not know that there is not a false bottom in that box [indicating].

Dr. ALSBERG. No; I don't.

Mr. LANNEN. Do you say that that is a false bottom? [Exhibiting tray that was in the box.]

Dr. ALSBERG. There are two different things. There is a tray in there, Mr. Lannen, and underneath the tray is another bottom. I did not refer to the tray as the false bottom. I am referring to what is under the tray, here [indicating].

Mr. ANDERSON. That is attached to the box?

Dr. ALSBERG. That is what I am talking about, not the tray. I recognize, of course, that it is legitimate to pack delicate candies in trays to prevent them from being injured, but I had reference not to the tray but to the bottom under that tray which is about a half an inch above the bottom of that box.

Mr. LANNEN. Now, don't you know, Doctor, that a large percentage of the candy people pack their boxes with trays in the box?

Dr. ALSBERG. I am not opposed to that.

Mr. LANNEN. Those trays are used to separate the solid chocolates from chocolates such as are not solid, such as chocolate creams, and to keep them separately so as not to cause them to run together and get mashed; is that not true?

Dr. ALSBERG. I am not opposed to that.

Mr. LANNEN. Now, is it not a fact, Doctor, that a box packed that way, with candies, with trays in it, and holding a pound, would be a considerably larger box than a box packed without trays?

Dr. ALSBERG. That is true, but that box wasn't designed for that reason. I think there is no objection to that, but that bottom was not placed there for that reason, because that bottom was raised above the bottom of the box a half an inch, for which I can see no legitimate reason. If the box were a simple box, with trays, there would not be that objection.

Mr. LANNEN. Still, it would be a larger package than one without the trays; that is true?

Dr. ALSBERG. Yes; surely.

Mr. LANNEN. And, setting on the shelves of a retailer, would appear to purchasers to contain more candy than the one without trays in it; isn't that true?

Dr. ALSBERG. Surely.

Mr. LANNEN. Would that be a package that would be illegal under this kind of a law?

Dr. ALSBERG. I don't think so.

Mr. LANNEN. Well, I, as an attorney, think it might.

Dr. ALSBERG. Well, I am not an attorney.

Mr. LANNEN. Now, Doctor, if this bill is enacted into law by Congress, does it not amount to this, that all packages of food would have to be put out in identical units or identical measure. For instance, you would have to have a half a pound, and a pound, and a 2-pound package, and a 3-pound package, etc.; isn't that true?

set alongside of this box, which contained one pound, how large a box would that be?

Dr. ALSBERG. Well, it would be a great deal larger. I do not know whether it would be twice as large.

Mr. LANNEN. Under this law it would be deceptive?

Dr. ALSBERG. No.

Mr. LANNEN. Would this package be deceptive, or the larger?

Dr. ALSBERG. I don't think it would be deceptive, because everybody knows that marshmallows weigh less than chocolates.

Mr. LANNEN. Well, now then, if it contained fine candy—let me put it this way—the size of a package containing a pound of candy depends upon the composition of the candy?

Dr. ALSBERG. Yes.

Mr. LANNEN. Isn't that true?

Dr. ALSBERG. Yes.

Mr. LANNEN. So that from the size of the box you are not justified in saying that a box of candy is deceptive because it looks larger than another box of candy, both containing a pound; isn't that true?

Mr. ANDERSON. May I ask you a question, Mr. Lannen?

Mr. LANNEN. Yes, sir.

Mr. ANDERSON. Well, nothing of that sort should be permitted. You ought to have special boxes in which there should be——

Mr. LANNEN (interposing). I am not contending for any fraud, but I am contending for the rights of my people, to keep them out of jail for innocent things, which are perfectly innocent within themselves. I know how a law of this kind will be enforced because I have tried probably as many food cases under the national food law as any attorney in the country.

The CHAIRMAN. I would suggest that to-day be set aside for those who desire to leave the city to-day. We will hear Mr. Lannen to-morrow.

We have a number here to-day who are from out of town, who would like to get away this evening. In order to accommodate them, if it is agreeable to Mr. Lannen, we will hear him to-morrow.

Mr. LANNEN. I expect to be heard on this to-morrow, and I would like to ask the doctor one more question, if the bill pending in the Senate, known as the Calder bill, 3011, were passed, if it would not protect all of these articles of food under the national food bill until they reached the consumer?

Dr. ALSBERG. Well, there is no provision in the Calder bill for taking care of any of the things this bill takes care of.

Mr. LANNEN. I know, but assume your bill passes as drawn and the Calder bill also passes?

Dr. ALSBERG. Yes.

Mr. LANNEN. If the Calder bill passes, then the national food law would affect these packages and protect them right down to the purchaser. That is true, is it not?

Dr. ALSBERG. If it is held constitutional, I don't know.

The CHAIRMAN. Are you through, Dr. Alsberg?

Dr. ALSBERG. Yes, sir; unless you desire to ask some questions.

The CHAIRMAN. Thank you, Doctor. We will first hear from out-of-town witnesses. Mr. Drake we shall be pleased to hear from you.

STATEMENT OF MR. FRED. R. DRAKE, REPRESENTING THE NATIONAL WHOLESALE GROCERS' ASSOCIATION OF THE UNITED STATES.

Mr. DRAKE. I am a wholesale grocer of the firm of Drake & Co., and I am chairman of the pure food committee of the National Wholesale Grocers' Association. This matter is of interest to all of the members of the Wholesale Grocers' Association. We simply would like to get before the committee the fact that we are favorable to this bill, but as Dr. Alsberg has stated, we would like to see the bill made mandatory as to the tolerances, making the word "will" read "shall." We will submit a brief to the committee. Mr. Newman, assistant to our president, will submit a brief, and we would like to have the word "may" read "shall," in order that it may be mandatory instead of optional.

We would like, also, to have the legislation, when it is passed, effective with regard to goods on hand, in the hands of merchants, and the labels. We are favorable to the bill, and Mr. Newman will submit our brief, which will take three or four minutes to read, if you gentlemen would like to hear it read.

Mr. MCKINLEY. How would it be to put it in the record. You are in favor of changing the word "may," in line 9 of page 2, to the word "shall"?

The CHAIRMAN. Can you state the attitude of the merchants toward this bill?

Mr. DRAKE. The attitude of the merchants is an entire agreement so far as our opinion goes, with regard to the Department of Agriculture, and the Bureau of Chemistry, and I think there is a disposition to back this among our members; that we are in favor of this, and that we are simply asking the committee and the doctor who is interested in this bill, to take cognizance of our wishes with regard to these two small items, making it mandatory.

The CHAIRMAN. Then you feel that it is fair to assume that the merchants in general are in accord with it?

Mr. DRAKE. I am here representing the National Wholesale Grocers.

The CHAIRMAN. I had reference to the retail merchants.

Mr. DRAKE. Well, I do not represent the retail merchants.

The CHAIRMAN. But you come in frequent contact with them?

Mr. DRAKE. Yes, sir; but all of us guarantee the articles in the invoices comply with the National and State pure food laws and we do not wish to pass on to our customers goods that are deceptive to the ultimate consumer.

The CHAIRMAN. Has your association had occasion to call on the Federal Trade Commission affecting matters covered by this bill?

Mr. DRAKE. I can't say with reference to this bill. With reference to deceptive trade practices, but not along this line so far as I am cognizant; but where they have been practicing deception by selling articles which were less than their known value, that we have taken up with the Federal Trade Commission.

Mr. PURNELL. Then you state that you would like to see this bill pass Congress, not only to protect yourselves as wholesale grocers, but also in the interest and the rights of the ultimate consumer?

Mr. DRAKE. Absolutely, sir. We want to see the goods get to the consumer at the least possible cost, and there is a lot of waste here in these slack-filled packages, and it is deception besides.

Mr. PURNELL. Well, the National Wholesale Grocers' Association. then, does not approve of this deception?

Mr. DRAKE. No, sir.

Mr. PURNELL. You say they have been forced, practically, into it as a matter of self-preservation?

Mr. DRAKE. Well, very often, sir, the manufacturer comes to the jobber after having gone to the retailer, and asks the jobber to take on an article which he already has orders for from the retailer, you see, and in our function as a jobber we very often take on a package of that kind which the manufacturer guarantees to us.

Mr. PURNELL. Do you know how long advance notice would be required by the manufacturers under the packages and labels they now have?

Mr. DRAKE. Well, in my own case, take, for instance, the salmon. We are sending our salmon labels to the Pacific Coast now for dispatch to Alaska next spring. Consequently we buy our labels in advance. We have put in orders now for labels for the 1921 pack.

Mr. PURNELL. Many concerns have hundreds, or thousands of dollars invested in containers and in labels; do you think we ought to protect those men who have been before, or will be in the future, guilty of fraud and deception?

Mr. DRAKE. Not guilty of fraud and deception, but I think regarding the labels that probably would be a factor to be considered in connection with this bill, and that it could probably be taken care of in a similar way that it was met in 1906 when there were hearings at that time in New York before the three Secretaries, Agriculture, Treasury, and Commerce, and at that time those three departments felt that it was equitable to allow a short time for the jobbers and manufacturers to take care of their labels so as not to produce an economical waste. In 1913 when the net-weight amendment was under consideration, the same tolerances were given to the Department, which amounted to, I think, 18 months in that case. I should say that 18 months would cover our case with regard to labels; because as soon as this law passes the manufacturer of any of these labels which are not being used would be stopped. They have got a lot of these goods on hand, and there are goods in the hands of retailers, which we think are not illegal now, and should be allowed to be sold by the innocent retailers.

Mr. JACOWAY. It is the innocent person that you want to protect, and not the person that is guilty of deception?

Mr. DRAKE. Yes, sir.

Mr. JACOWAY. That is the reason you are in favor of this bill?

Mr. DRAKE. Yes, sir; not to protect deceptive trade; but because we do not believe in deception to the retail customer.

Mr. JACOWAY. But the deception that is being practiced is responsible for having forced some of the wholesalers to engage in this?

Mr. DRAKE. Yes, sir; I presume that is true.

Mr. JACOWAY. And you think, if this bill is passed, it will make all come to the same law, that is the reason you are in favor of it; what is your object?

Mr. DRAKE. That is my idea; yes, sir.

The CHAIRMAN. We thank you, Mr. Drake. The amendments which you propose will be given consideration.

We will now hear Mr. Newman.

STATEMENT BY MR. JOHN B. NEWMAN, ASSISTANT TO THE PRESIDENT OF THE NATIONAL WHOLESALE GROCERS' ASSOCIATION.

The CHAIRMAN. Mr. Newman, will you give your full name.

Mr. NEWMAN. John B. Newman.

The CHAIRMAN. What is your business?

Mr. NEWMAN. Up to last week, I was food commissioner for the State of Illinois, and Dr. Alsberg referred to me in that capacity. Last week I resigned and went to work for the National Wholesale Grocers' Association.

Now, in further verification of what Mr. Drake said about the competition by the people who enter this unfair competition, this will eliminate their trade when the retailers will not engage in this kind of practice. It would establish a maximum, and I think that in view of that that this bill should say in section 4, right after the word, "filled," it should—in line 7, page 2—it should read, "if in package form, and irrespective of whether or not the quantity of the contents be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, as provided in the preceding paragraph, the package to be filled with the food it purports to contain"; and now insert, "consistent with good commercial practice."

Now, that is good commercial practice. That is not fair commercial practice, nor poor commercial practice.

Mr. PURNELL. Who is going to determine?

Mr. NEWMAN. Dr. Alsberg would be the last one on that, and he and the department which he represents, have a wonderful lot of records on it, and have the means of making investigations, and they are very far on that proposition now.

Mr. CARAWAY. How would it be to put in this: "As determined by Agricultural Department"?

Mr. NEWMAN. Well, I think that should be quite good enough, good commercial practice.

The CHAIRMAN. Who would determine what would be good commercial practice?

Mr. NEWMAN. Well, I think the Department of Agriculture.

Dr. ALSBERG. It would be a matter for the courts to determine, what good commercial practice was, and it would be up to the department to express an opinion as to such and such a process of a manufacturer, but the courts would have to determine as to the question of fact. In that way it wouldn't be much different from any other issue of fact.

Mr. JACOWAY. But it would be a long way of getting relief if it had to be taken through the courts.

Dr. ALSBERG. There will be very few cases that will have to be taken to the courts, I think.

The CHAIRMAN. What would be construed to be the meaning of good commercial practice?

Mr. PURNELL. It does not mean anything.

Mr. NEWMAN. Well, in circular 144, it states that the addition of water, brine, sugar, or sirup, is required for the proper packing and preservation of some food products.

Now, Dr. Alsberg has told us what they would consider as contamination. Now, some of these foods are packed in lump form. Now, it is not possible to stand with a can open and let a little air out and add a little more to the contents. That is not good commercial practice. It would not be good commercial practice to do that.

Now, we have an automatic weighing and filling device. It is good commercial practice, and it is economical and the proper and satisfactory way of doing. Now, I don't think that we should stop or hold this up to get a law like that. Now, you know that the housewife, in the home, when she is canning jams or fruits, she takes a knife and lifts the top and lets the air out of the can, and then puts a little more of the jam into the can. Now, we can't do that commercially. I understand that Dr. Alsberg has stated that they would limit the disposition of the retailers' goods on the shelves.

Mr. MCKINLEY. May I ask Dr. Alsberg right there whether he is agreeable to that suggestion?

Dr. ALSBERG. I, personally, haven't any objection to it. I would like to confer with the Solicitor of the Department, and not commit the Department without conferring with him.

Mr. PURNELL. Well, then, the question is asked if that particular case would be determined in court?

Dr. ALSBERG. That is the way we have been operating with all of our cases heretofore.

Mr. PURNELL. Would it be possible for the Department to lay down some rules applicable in a general way?

Dr. ALSBERG. I think we do that right along. For the last two years we have been carrying out a rather extensive investigation, with which Mr. Newman is familiar, on how much of an article there should be in cans of different sizes. We have put up experimental packs, a few cases in canneries in all sections of the United States, of all of the different varieties of fruits and vegetables. We had to put up thousands of cases and let them stand, and then we would cut them and find out how they looked, those which were over-filled and those which were under-filled. We also get the judgment of the trade. On the basis of these investigations we issued opinions that in our judgment it is good commercial practice to pack a number 2 can so and so. Of course, such an opinion has no authority in law; it is merely the bureau's opinion, which the manufacturer, if he wishes, can follow as a guide. If we are wrong, he has the right to prove that we are wrong in court, if he can't convince us out of court.

Mr. JACOWAY. Would it be better to provide rules and regulations in your department by which they would be guided?

Dr. ALSBERG. Well, if you want to give an executive department that measure of power, which isn't customary in Congress, it could be done that way, but the Department isn't asking for that degree of power.

The CHAIRMAN. Have you been doing that to some extent?

Dr. ALSBERG. We have been doing that as far as we could, right along.

The CHAIRMAN. Should that power be extended?

Dr. ALSBERG. I don't think we need it.

The CHAIRMAN. Does that give you the necessary authority?

Dr. ALSBERG. Yes; I don't think we should be placed above the courts. That is what such a proposition as that would do.

The CHAIRMAN. Of course, you would be subject to the courts?

Mr. DRAKE. Mr. C. A. Thayer, of Austin, Nichols & Co., wholesale grocers, of New York; Mr. James Hewitt, of J. H. Kellogg & Sons, wholesale grocers, of Philadelphia; Mr. A. N. Merritt, of Chicago, Wholesale Grocers' Association, Chicago, and Mr. Arthur Spencer, of New York, of Breed, Abbott & Morgan, counsel for the National Wholesale Grocers' Association of the United States, are present.

The CHAIRMAN. Do they desire to be heard?

Mr. NEWMAN. Mr. Chairman, it is the custom to hold a meeting at the Agricultural Department, and they go into these things, and Dr. Alsberg gives out a F. I. D., etc.

Now, I do not imagine this question will very often get into the courts. Dr. Alsberg will make a ruling as to the tolerances, and the trade will follow pretty closely. His department will make a ruling as to what is good commercial practice, and it will be taken care of. The trade, I believe, will have all been put on equal footing, as a matter of law. As a matter of fact, of course, it could go to the courts, but I don't think it would ever go that far. I do not think there would be any trouble in giving Dr. Alsberg the right to say, or the right to make rules for the trade, and the trade will know beforehand, know right off the bat, and they would not have to wait until they go to court. He could say what was good commercial practice on this, and they would take it up as in the past. In that way they could take it up and find out just what good commercial practice was, and then the trade would know beforehand, and they would not be forced to wait and find out what was the decision of the court, two years after the case was filed.

Mr. PURNELL. Men who want to violate it would take it to court to find out what good commercial practice is.

Mr. NEWMAN. I don't think that any man could violate the terms and make good. I think we could get the crooks all right enough. I don't think we ought to leave any loopholes for the crooks to get by. Just give the legitimate trade some way of finding them, devising a thing of that kind, and it is going to be accepted. It comes back to the word "fair."

Mr. JACOWAY. Mr. Chairman, may I ask Mr. Newman some questions?

The CHAIRMAN. Yes, surely.

Mr. JACOWAY. Now, there is one thing there, tolerances. Now, I suppose those tolerances will be determined with reference to the commercial practice, and if you make those tolerances mandatory—now, if you do make them mandatory with reference to the matter of good commercial practice I don't see where your amendment has any particular effect.

Mr. NEWMAN. Well, I think the amendment is mandatory that they should make them with reference to good commercial practice.

Mr. JACOWAY. I don't know whether it is mandatory, but I think it is good sense.

Mr. NEWMAN. It is at the present time, the way the department is conducted, but you do not know what it will be in the future, at some time when his successor might make rulings that would not be proper.

Mr. LEE. May I ask Mr. Newman a question? I want to know just with regard to that amendment, whether he has in mind that reasonable rules and variations, reasonable variations and tolerances may be established by the regulations made in accordance with present methods; that is, by the Secretaries of Agriculture, Treasury and Commerce, if that does not take care of the filling of packages in accordance with the rule of reason and not binding down to any method which is fixed by trade convention?

Mr. NEWMAN. Well, I think they should be bound down somewhat to good trade practices.

Mr. LEE. I just ask if it would give any effect to those words—the proviso, found on page 2, lines 8, 9, 10, and 11 of the section—if that does not take care of any tolerances or variations that there should be in filling packages—if that does not properly take care of it?

Mr. NEWMAN. You mean, "good commercial practice" should be inserted for "reasonable variations"?

Mr. LEE. I am asking you. I understand the language "good commercial practice" qualifies the word "filled." Would "reasonable tolerances" take care of the situation in a better shape?

Mr. NEWMAN. With some man making rules and regulations, without any experience, or without any desire to get information, there would be trouble.

Mr. LEE. The law says it shall be reasonable.

The CHAIRMAN. Mr. Newman, you have the views of several as to the time when the penalties under this law should become effective. Is it your opinion that it should not go into effect for some time, so as to give the trade an opportunity to dispose of or use up the goods they have on hand? Would you not provide such a limitation? Of course, from some of the packages that we have before us, it would seem that some are practicing fraud—that some have used those packages for the purpose of deceiving. Would you care to give them protection?

Mr. NEWMAN. No, sir.

The CHAIRMAN. How would you differentiate?

Mr. NEWMAN. I am not able to answer how, but I think that some of those packages shouldn't be given very much consideration.

The CHAIRMAN. That is a difficult situation.

Mr. NEWMAN. I don't think that potato-chip package ought to have 20 minutes. Now, that might be taken up in a way and something might be put in there which would make it possible to differentiate between these packages, leaving that to the Agricultural Department to take care of by rules and regulations, by F. I. D's., and allow the department, for instance, to grant anywhere from one to four years for these goods to be sold. I think 18 months would be enough time for the innocent retailer to get rid of the stuff.

Mr. ANDERSON. In a package of noodles I have here it says that the contents are 2 ounces; and if it does contain 2 ounces, it is about one-third filled. If it were filled, it would contain about 6 ounces. All that would be necessary to do with this package, if it were entirely filled, would be to change the statement on it as to its net weight. Now, that wouldn't be a very great hardship on anybody, would it?

Mr. NEWMAN. No, sir.

The CHAIRMAN. Would you favor leaving it to the Secretary as to how it should be done?

Mr. NEWMAN. Yes, sir; I believe a clause like that would be satisfactory, and that it might be left to Dr. Alsberg.

The CHAIRMAN. Is that done in case of criminal statutes; would it be proper to do it?

Mr. NEWMAN. I presume it would not be proper to do it with criminal statutes.

Mr. JACOWAY. You take a package that was properly filled and settles down before it reaches the customer's table—would that be legal?

Dr. ALSBERG. There should be rules and regulations to take care of that.

Mr. NEWMAN. Gentlemen, those are the only two things that the grocers want to present to you, and I have, for filing, a brief for your attention.

The CHAIRMAN. Without objection, the brief will be incorporated.

(The brief referred to above is printed in the record in full, as follows:)

MEMORANDUM IN BEHALF OF NATIONAL WHOLESALE GROCERS' ASSOCIATION OF THE UNITED STATES.

H. R. 8954, introduced by Mr. Haugen, referred to the House Committee on Agriculture, proposes to amend the food-and-drugs act of June 30, 1906, as amended.

This bill would amend said food-and-drugs act by adding, in section 8, after paragraph 3, in the case of food, a new paragraph, reading as follows:

"Fourth. If in package form and irrespective of whether or not the quantity of the contents be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, as provided in the preceding paragraph, the package be not filled with the food it purports to contain: *Provided, however*, That reasonable variations and tolerances may be established by rules and regulations made in accordance with the provisions of section 3 of this act."

This provision is designed to prevent the sale of so-called "slack-filled" packages, as, for example, the sale of a 3-ounce package containing 2¼ ounces of pepper.

The bill provides that reasonable variations and tolerances may be established.

Paragraph fourth, quoted above, provides "that reasonable variations and tolerances may be established," etc.

Variations necessarily occur in packing food products in containers due to the physical impossibility of filling every package with exactly the same quantity and due to the effect of shrinkage and evaporation, which will differ in various localities owing to climatic conditions. Moreover, some food products can not be properly packed without the addition of water or brine. This fact is specifically recognized by the Department of Agriculture in F. I. D. 144, which states that the addition of water, brine, sugar, or sirup is required for the proper packing and preservation of some food products. In so far as such variations and tolerances are necessary and inevitable they should be recognized, and it is, therefore, submitted that the statute should provide that reasonable variations and tolerances shall be established and not that they m

The situation with respect to this amendment is analogous to the ame

of the food-and-drugs act by the act of March 3, 1913 (the net weight amendment), requiring all food in package form to be branded with the quantity of the contents in terms of weight, measure, or numerical count, and providing "that reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established." * * *

We respectfully request, therefore, that the provisions in the pending bill as to variations and tolerances be made mandatory, and that the word "may" be changed to "shall."

The bill in its present form does not allow a reasonable time for the disposal of goods on hand.

This bill in its present form would prohibit the sale of those packages of food now on hand which, while accurately branded with the weight, measure, or numerical count, and which in every respect comply with the existing law, are, because of climatic conditions, unavoidable settling of the product, evaporation, and other reasons, "slack filled." The failure to allow a reasonable time for the disposal of such packages now in the hands of the merchant imposes upon him grave hardship and loss.

There are at this time enormous stocks of goods which had been packed and prepared for market in the utmost good faith. The failure to allow a reasonable time to manufacturers and merchants to dispose of said stocks on hand would cause a serious economic loss during a critical period rendering quantities of food subject to seizure and destruction which at present comply with all statutes, and creating extensive and costly litigation.

In the past the Government has always allowed reasonable time for the correction of violations and the disposal of goods on hand.

The net-weight amendment of the food and drugs act allowed 18 months for the disposal of packages on hand not branded with the weight, measure, or numerical count.

Food-inspection decision 153, dated May 4, 1914, which was issued after it had been determined that the guaranty legend on food packages was misleading and deceptive, and which canceled all such guaranties and their serial numbers, permitted until May 1, 1915, almost one year, for the disposal of labels and packages branded with such legend. Subsequently, by food-inspection decision 155, the effective date was postponed until May 1, 1916, and still later, by food-inspection decision 167, the effective date was again postponed until May 1, 1918, permitting in all about four years for the disposal of packages and labels bearing the guaranty legend.

CONCLUSIONS.

In conclusion, it is respectfully submitted that H. R. 8954 be amended in the following particulars:

First. By striking out the word "may," on page 2, line 9, of the bill, and substituting therefor the word "shall."

Second. By inserting in the bill a provision allowing reasonable time for the disposal of goods on hand which do not comply with the provisions of paragraph fourth, section 8.

Third. By inserting on page 2, line 7, after the word "filled," the words "so far as is consistent with good commercial practice."

NATIONAL WHOLESALE GROCERS' ASSOCIATION OF THE UNITED STATES.
ARJAY DAVIES, *President.*
ALFRED H. BECKMANN, *Secretary.*
FRED R. DRAKE,
Chairman Pure Food and Legislative Committee.
BREED, ABBOTT & MORGAN, *Counsel.*

OCTOBER 27, 1919.

The CHAIRMAN. I thank you, Mr. Newman. We would be pleased to hear from Mr. Hewitt, the next witness.

STATEMENT OF MR. JAMES HEWITT, OF H. KELLOGG & SONS, WHOLESALE GROCERS, PHILADELPHIA, PA.

The CHAIRMAN. Please give your full name to the reporter, Mr. Hewitt.

Mr. HEWITT. James Hewitt. I am a member of the executive committee of the National Wholesale Grocers' Association. I am also a

member of the firm of H. Kellogg & Sons, of Philadelphia, Pa. As wholesale grocers we think, and as members of the national committee we think, this a most excellent movement on the part of the food branch of our Government. We have no sympathy at all with the packages that are intended to deceive, but in the endeavor to get at this matter we want to take care of the honest merchants that happen to have packages that might be open to such criticism, and it is for this reason that we are here to ask that the word "may" should be changed to the word "shall," and that tolerances, and that a reasonable time be given for the removal of goods that are apparently contrary to the provisions of this bill.

Mr. JACOWAY. May I ask a question there? I do not want to interrupt you, but there is a question in my mind, and that is whether or not the law should provide simply for the sale of the packages already filled, which might be a violation of the law as now proposed, or whether we shall go so far as to permit the use of all labels which are already in the hands of the manufacturers. I know that there is a great difference between permitting the selling of packages already filled in this way and permitting these people to go on and continue to fill this way—continue to use the same labels.

Mr. HEWITT. I think there should be some discretion given the food department in cases of that kind. I think also—I see the difficulty that is in your mind—I do not know, but it strikes me that if some phraseology could be put in there something like this, that the package should be in some just proportion to its net contents; that allows, if a package is supposed to contain two ounces of potatoes, and if there is room for four ounces, I should say that the package was altogether out of proportion to the net contents—and the only objection to doing that, apparently, is to deceive. The buyer thinks that he is getting a fine lot of potatoes when he buys that package, and he finds when he gets it home that he hasn't hardly enough for himself. The same is true with the noodle proposition. Wholesale grocers as a body, gentlemen, are opposed to fraud, no matter whatever source it comes from, and I think every business man is; not because we are so good, such good people, but it is not good policy, and does not promote good business.

Mr. JACOWAY. In other words, this potato chip package should not be allowed to be placed before the public in this form?

Mr. HEWITT. They should be made to fill the package.

Mr. JACOWAY. They should be made to fill the package?

Mr. HEWITT. Yes, sir; they should be made to fill the package. With regard to the other labels, that could be taken care of by a sticker. A sticker would remove that difficulty.

Mr. JACOWAY. With regard to this package, they could put in six ounces instead of two?

Mr. HEWITT. But in the case of a can of spinach, which Dr. Alsberg was speaking about, that would be harder to do.

Mr. JACOWAY. I suppose so, but a package of this form [indicating] could be easily handled?

Mr. HEWITT. Yes.

Mr. WILSON. With reference to that package [indicating], could that be easily handled?

Mr. HEWITT. This is not altogether a fraud. This bottle was not gotten up, primarily, to deceive. It comes from France, and the

French are lovers of the artistic as well as the useful, and it does not deceive.

Mr. PURNELL. It does tend to magnify, however?

Mr. HEWITT. Yes; glass will do that. And when the grocer goes to buy a package like this he can see it, and the retail grocer when he buys bottles of this kind will count and find out how many olives are in a bottle before he buys. It is not so in the case of a deceit like this [indicating package], because nobody knows what is in this until he opens it.

Mr. RUBEY. And it is evidently gotten up for the purpose of deceit?

Mr. HEWITT. Yes.

Mr. LANNIN. In view of that statement, would your association be in favor of having the element of guilty intent incorporated in this law, so as to protect the innocent man who does business in good faith?

Mr. HEWITT. I can't answer for the association, but I think so. That is what the law has.

Mr. LANNIN. I think that would paralyze all of the food industries of the country.

Mr. HEWITT. In your case of candy—a few years ago, when I was not making quite as much as I am now, when I bought candies, this candy was 60 cents, and this one was 80 cents, and the 80-cent box looked very much larger than the 60-cent box, and I asked the man to tell me the reason why, and they told me it was on account of the quality of the candy; that the better the candy was the lighter it was, and therefore it took up more space; and, regarding fancy boxes, our firm before the war used to import a great many fancy boxes. They were works of art. People didn't buy them so much for the candy as for the beautiful picture. When you took the lid off you found that they were filled largely with cut paper before you reached the candy. That kind of candy was good candy, but nobody bought it because the candy was good. It was very good, but the people bought it for the beautiful box.

Mr. LANNIN. But if there was an element of guilty intent it would catch all of the packages which were really fraudulent, would it not?

Mr. HEWITT. Yes; I think so. I think a package ought to be in proportion to what it is intended to cover; that is, if it is intended to be used for 2 ounces, why it is fraudulent to take an 8-ounce package for it, and if intent also applied with reference to the article as well as to the container, after it was filled, then that would cover your objection.

Mr. LANNIN. Then if the manufacturer proved, for instance, that it was good trade practice and that he was acting in good faith, and there was no element of intent to defraud or deceive anybody, the law would let him out.

Now, the manufacturer of that box of candy maybe had a very good reason for putting it in that kind of a box. I do not know. I wouldn't convict him of fraud unless I knew what the facts were. He might be able to convince every man in this room that he had a very good reason for putting it in that kind of a box.

Mr. MCKINLEY. How about the false bottom?

Mr. LANNIN. I am talking about the false bottom. I would not convict him of fraud. He might be able to convince every

man sitting here that he had very good reasons for it. That is why I say that the element of intent to defraud should come in.

Mr. McKINLEY. That is entirely within this matter.

Mr. HEWITT. That is all, unless you have some questions to ask, I will give away to somebody else.

The CHAIRMAN. We are very grateful to you, Mr. Hewitt.

Mr. HEWITT. Thank you.

The CHAIRMAN. We shall now hear from Mr. Madison.

STATEMENT BY MR. H. W. MADISON, OF THE WIDLER CO., CLEVELAND, OHIO.

Mr. MADISON. Before the war, these containers [indicating] were made to be sold at a nickel apiece when they were filled with spices. Instead of the manufacturers raising the price, they put less in a package. In the fall of 1917, Widler & Co. took the matter up with the Federal Trade Commission, and they paid no attention to it, and Widler & Co. got no action. In 1918, I think it was, Dr. Alsberg, that some of our goods were seized. We had also taken it up with Dr. Alsberg before then. We hardly felt that it was a fair proposition, and that it was questionable to put a package of this kind out and sell it for a nickel.

Now, at the present time, we use a package something like this [indicating], packing two ounces in it and selling it for 10 cents, putting up a uniform package. When you use spice, two ounces will fill it almost to the top. If you use pepper, it will only fill it about three-quarters full. If this law goes into effect as it is, with the mandatory clause, we will have to have different size boxes for each package. Now, we couldn't very well have a package for the different sizes, a package for pepper, and one for spice, and so on down.

We took this up with the Federal Trade Commission, but we could not get any action of that kind, and I do not think any action has been taken on our case. We tried to raise the prices, but when you have 15 or 20 other houses that are putting it up at 10 cents a package, you can not put yours up and sell it for 25.

Mr. PURNELL. You didn't reduce it until after the other concerns had?

Mr. MADISON. Absolutely. At the time the matter came up we took it to Mr. Newman, and the case against Widler & Co., I think, was called off. Now, this was marked, the contents of the can was marked. They just didn't fill it more than three-fourths full. You have no idea what a package like that costs when you have got it completely filled, and if there was a uniform package used, and we were filling it in accordance with good commercial practice, I think that objection would not apply.

Now, you take this can that sells for 5 cents, the container costs just as much as the can that is selling for 10 cents. That is, the actual cost of the can. It costs just as much as the package that sells for 10 cents. Now, I think in that case that they actually had 1 cents worth of spice, and the other 4 cents represented the can, labor, and profits, and I think at that time the actual can was 1 cent, and 3 cents for labor and profits.

Mr. WILSON. What do those cans cost?

Mr. MADISON. These cans, before the war, we bought at $6.10 a thousand. During the war we paid 14 dollars and some odd cents for them, so you see, most of the trade throughout the country at the present moment has discontinued entirely the nickel can and has gone to the 10-cent can. The consumer has been stuck so often in the small container, with such a small amount in the small packages, that they are now watching it.

The CHAIRMAN. Would it be possible to put it in a paper package?

Mr. MADISON. That is very much cheaper, but the customer prefers a tin package. Now, some articles can be packed very well in a paper package, but if some of them are kept any length of time they get damaged.

We finally settled upon the plan to market a 5-cent size, with no weight mark on it, but since within about 6 or 8 months, this thing came up, we have entirely changed all of our packages now, and have a nickel package, which is a small package about half the size of this [indicating]. Some of the spice fills them entirely and others fill it three-fourths, and the same is true with our 10-cent package, some of the spices will fill them entirely full, while heavy ones like mustard, will only fill them about three-fourths full, and every package has a weight marked on it, and it is filled up to that weight, which is in accordance with good commercial practice. As stated, unless this law is changed, it may not be necessary for us, for years, while Dr. Alsberg is in office, to change this, because he has been very fair, but if his successor should decide differently the manufacturers might better go out of business.

Now, Widler & Co. pack spices for a great many people who use their private brands. We pack for Drake & Co., big wholesalers. This thing came on as to quantity reductions, but the fact is that with us we had $100,000 tied up in printing, printing plates, and labels, and we were in favor of keeping the same size package and advancing the price instead, but the general trade reduced the quantity that they put in their packages, and kept the same price. I think Dr. Alsberg kept in touch with the various prices, relative to whether they are sold for 15 cents or 19 cents.

But there is one big reason why nobody changed back, because they have thousands of dollars tied up in labels. Now, Widler & Co. could not go ahead and pack spices for Drake & Co. and sell their spices at 19 cents a package, and Drake & Co., who would be in competition with them as wholesale grocers, be selling the same size package at 10 cents.

Mr. WILSON. But not the same contents?

Mr. MADISON. But three-fourths of an ounce means nothing to a consumer, as Mr. Newman has said, unless the package is filled in accordance with good commercial practice, it is no good. Now, the consumer has no means of knowing, because they will take a can this big [indicating] and it won't have but a half ounce of pepper, and is packed according to law, that is all.

The CHAIRMAN. The others doing this forced you to do it?

Mr. MADISON. Absolutely.

The CHAIRMAN. We are very much obliged to you, Mr. Madison.

Mr. MADISON. Thank you.

The CHAIRMAN. I believe Dr. May is the next witness.

STATEMENT BY DR. S. MAY, OF THE WIDLER CO., CLEVELAND, OHIO.

Dr. MAY. I think that Dr. Alsberg can get in touch with the manufacturers, who have been in the business since 1905, and he will find that each manufacturer will agree with him and will give him all full particulars as to what is a reasonable tolerance, that should be allowed in packing all commodities. Take up that bottle of extract [indicating]. We sell quite a number of extracts and bottled goods, but we have to buy the bottles that we can get, and we always endeavor to get as fair-sized bottles as we can get, and you will find to-day that they are making all sizes of bottles, putting in glass, and not actual contents. We do not save money if we get a small bottle. You get that very small bottle and you would save money, packing, shipping, and freight, and the printing of labels and cards, but as it was brought out here this morning, one firm alone is not in position to force the whole United States into one channel. It requires legislation, and we have come here this morning to approve of this particular act, with this exception, as Mr. Madison has stated for certain relative, specific bodies. Cinnamon being much lighter than black pepper or white pepper, two ounces of cinnamon will occupy a certain space which, against the same amount of black pepper or white pepper will be only approximately half of that space. Now, you could make some reasonable allowance for commercial practices and tolerances with reference to cans for these different varieties of spices.

Mr. ANDERSON. As you understand the trade practice now, it is to have a standard package which will hold five cent's worth or ten cent's worth?

Dr. MAY. Yes, sir.

Mr. ANDERSON. And by putting it in that package, you could avoid filling that package?

Dr. MAY. Correct.

Mr. ANDERSON. With reference to that, if it is three-fourths filled, or entirely filled, or if there is seven cent's worth in it, or whatever it is, that is correct?

Dr. MAY. That is correct. We fill these packages with automatic machinery. If you had to change the automatic machinery, for instance, two ounces fill one package, and of another kind of spice two ounces will only three-quarters fill the package. To change the automatic machinery so as to put in two and one-half ounces makes a two hour job. The machines will fill about 40 packages a minute, whereas, by hand, you can get about 10 a minute, that is the best you can do.

Mr. CHAIRMAN. In your opinion, what is the attidude of the retailer as to this?

Dr. MAY. We sell to wholesale grocers, and guarantee it to comply with the pure food act, but they in turn pass it on to the retailer, and if there is any trouble with regard to it we have to stand back of them. I, personally, would recommend that a reasonable length of time be permitted so that the manufacturer could use up any cans or containers he has on hand at the present time.

The CHAIRMAN. In your opinion, how much time would that require?

Dr. MAY. From general experience, and from what I have heard and what I know, the usual allowance is 18 months. Perhaps 16 months. And then, I think there should be a reasonable allowance, or it may be less time. The packer can always tell. The manufacturer can give you the record showing how much spice or extract, or anything else our jobbers may use in 6 months, and he in turn can give you records as to how long it takes to dispose of them, and pass it right down to the retailer. I think a man never buys more than a six month's supply.

The CHAIRMAN. In cases where you have been putting up packages only one-half to two-thirds filled, do you mean in those cases too, that the law should take effect only after you have used all labels, all cans, and all containers?

Dr. MAY. It can cover both labels and cans, and I think Dr. Alsberg could get all of the information he wanted from every manufacturer in the United States, and then use his own judgment, and allow a reasonable length of time.

Mr. MADISON. Pardon me for interrupting again, but I think that we should use up all of the labels, and cans, and use up all of the stuff that is already packed, and all of the stuff that is already in the jobbers' hands, already packed. We might have to take the labels we have and put stickers on the label. We don't want to think that we ought to use up all of our labels.

We have got a case right now where we have just had goods released from Chicago. That package was in accordance with the law, but they were seized and held, and there has been another law since that time, and the goods can not be disposed of now, which is not fair. Goods which are already packed should be allowed to be disposed of in the package.

The CHAIRMAN. How much time would be required?

Mr. MADISON. From 12 to 18 months.

We would have to leave that entirely up to Dr. Alsberg's department. That is always true, that the innocent have got to suffer with the guilty, but that would be all right, as we might have one guilty where we would have a dozen innocent houses doing this. We might have enough packed to last for six or eight months, and the wholesale houses ought to be taken care of.

Dr. ALSBERG. May I interject a point? I take it that this law is not going to be made retroactive, and that it will only apply to goods in shipment in interstate commerce after the passage of this act. So it can not in any way possibly apply to what is on the shelves now, or what is in transit now, or what may be put in transit between now and the time the law is effective.

Mr. MCLAUGHLIN of Michigan. How about the original package in interstate commerce?

Dr. ALSBERG. Well, the original package now is a legal package at the present moment until the law is amended. Now, if the law is not to be made retroactive, anything that has been shipped will be shipped prior to the signing or the passage of the law. If no time limit is set, it could not be proceeded against. In other words, we can wipe out from consideration all stocks, everything that is on the grocer's shelves now, and everything that has been shipped to him and will be shipped to him before the bill becomes effective.

Mr. McKINLEY. I think that that isn't correct, with regard to the things that are on the wholesale grocer's shelves?

Dr. ALSBERG. If the wholesale grocer has stuff on hand to ship after this goes into effect, of course, such goods would come under the jurisdiction of the law.

Mr. McKINLEY. Well, could he ship that outside of the State?

Dr. ALSBERG. He could.

Mr. McKINLEY. I know; you didn't say anything about wholesale grocers, you said if it was in the hands of a wholesale grocer it wouldn't be effective.

Dr. ALSBERG. It wouldn't be effective if it does not go into interstate commerce again.

Mr. McKINLEY. In other words, it would be effective if in the wholesale grocer's hands?

Dr. ALSBERG. If it was shipped out of the State by the grocer.

Mr. DRAKE. I think that it would be desirable for disposing of the goods and for the wholesale grocers, of course, to ship them in interstate commerce and the stores that have them on hand should have time to dispose of their stocks.

Dr. ALSBERG. There is another point I would like to mention, and that is that this law is the local law in the District of Columbia and the Territories and that it would apply to the retailer in the District of Columbia, because the District of Columbia would come under this law whether the goods passed in interstate commerce or not.

Mr. LANNIN. I would like to ask the witness a question if I might. Doctor I am interested in spices on account of some of the people in the association which I represent. Doctor, I would like to ask you if there is any spice package, either filled or not filled, that the consumer gets the full value received; in other words, he pays 5 cents for a can and gets 5 cents worth of spice, does he not?

Dr. MAY. He does; that is, with this exception, the actual cost of the package.

Mr. LANNIN. Well, I mean that, but suppose that the can he gets for 5 cents, the can of spice, that package it contains 5 cents worth of spice, so that the question of protection is purely academic; is it not?

Dr. MAY. Well, I would rather have Mr. Madison answer on the spice end, because he knows more about that than I do. I am not as well posted on that as he is. But I would say that it would be a theoretical question I take it.

Mr. LANNIN. But it would be, so far as that is concerned?

Dr. MAY. No; she would be getting her money's worth.

Mr. ANDERSON. The package is larger than it ought to be, based on the amount contained in the package, then she really has to pay for that larger package?

Dr. MAY. Yes; to that extent, the package is larger than it ought to be.

Mr. LANNIN. She gets as much as she would get from any other concern?

Mr. MADISON. That is a general trade practice, you know, Mr. Lannin.

Mr. LANNIN. Now, the use of this package is not to deceive [indicating].

Mr. MADISON. That is absolutely true.

Mr. LANNIN. And the question of the larger package is purely an economical question?

Mr. MADISON. This package might be a package that was three-fourths full, or it might be a package that was one-fourth full, depending on the size of the package and what was in it, and yet you would get value received, and in one package of the same size you might get a half ounce and in another package of the same price you would get an ounce.

Mr. LANNIN. How much would you pay though?

Mr. MADISON. You would pay 5 cents in one case and you would get 3 cents' worth and you would in another case get a nickel's worth.

Mr. LANNIN. I certainly do not see where she would get the same amount in each case.

Mr. MADISON. No; they did not get the same amount. As prices went up they got less, according to the manufacturer.

Mr. RUBEY. They got the same can?

Dr. MAY. They got the same can but less spice.

Dr. ALBERG. I might cite a specific case. One manufacturer put out a package which was considerably shorter than those that had been sold in a community. It was the same sized package, but contained considerably less than the trade package which was customary in that particular district had been containing for years. He, by virtue of having less in the package, was able to sell to the retail grocer for less, so that it was to the retailer's interest to push these particular goods at the expense of the other goods which cost the retail grocer more. He didn't give the retail grocer the full benefit of the lesser cost of packing the article, but he used the difference between the lesser cost and the lesser price he charged the retail grocer to stage an advertising campaign in this city on this particular article. He put over on the public the lesser package and the public paid for it. He told me himself about it. The public paid the extra profit the retail grocer made and the cost of the advertising campaign, so that the public actually was injured in that particular case in that particular locality.

The CHAIRMAN. Dr. Alberg, have you some other matters that you desire to discuss in this connection?

Dr. ALBERG. Only general matters with regard to food and drugs, and the formulating of a bill in the department and recommending it to the committee, sir.

The CHAIRMAN. Will you indicate what they are, so that the gentleman may be proposed?

Dr. ALBERG. Perhaps the best that I can do is to read this letter from the department.

DEPARTMENT OF AGRICULTURE,
Washington, October 25, 1919.

Hon. G. N. HAUGEN,
Chairman Committee on Agriculture,
House of Representatives.

DEAR MR. HAUGEN: I desire to recommend for the consideration of your committee the following amendments to the food and drugs act in addition to those contained in H. R. 8954:

1. That authority be conferred upon the Secretary of Agriculture to fix standards for all foods and that the act contain suitable provisions to enforce

conformity to such standards of foods shipped or transported in interstate or foreign commerce.

The standards now adopted by the department for the enforcement of the food and drugs act are prepared by a special committee appointed for that purpose, known as the joint committee on definitions and standards. Such standards are issued merely for the guidance of the trade and officials engaged in the enforcement of the food and drugs act and have no effect in law. They are based on all the information that the committee is able to secure from the trade in the article affected and are not accepted by the courts as conclusive. In the cases tried under the act it has been necessary to prove such standards as a fact through the employment of experts. The department in these trials has been uniformly successful in proving the standards adopted, although at great expense both to itself, the Department of Justice, and to the party prosecuted. Not only would the authority conferred by the suggested amendment simplify the procedure under the act, but it would also serve, through the publication of the standards established, to tend to eliminate to a large extent without court proceedings unfair competition through the substitution of spurious articles.

2. That the list of drugs set forth in section 8, paragraph 2, in the case of drugs, the names of which are now required to be stated on the labels or packages containing them, be extended to include all habit-forming and poisonous drugs. In this connection see U. S. *v.* Antikamnia Chemical Co. (231 U. S., 654).

If you should with to consider prohibiting the use in articles generally sold to the public and limiting to use in filling physicians' prescriptions all habit-forming and poisonous drugs and their derivatives and the drugs now specifically named in subdivision 2 of section 8 of the present food and drugs act relating to drugs, or should wish to consider requiring that labels state the objectionable features of each drug, e. g., "aconitin, a poison," I shall be glad to furnish your committee all the information that this department has collected bearing on the subject.

If you so desire, the department will be glad to incorporate the above recommendations in the form of a draft of a bill and submit the same for your consideration.

Very truly, yours,

D. F. HOUSTON, *Secretary.*

The CHAIRMAN. In your opinion, should that be given consideration in connection with this matter?

Dr. ALSBERG. Well, if it is desired to take it up in connection with this particular bill, if you desire to consider it.

Mr. MCLAUGHLIN of Michigan. What are the different kinds of food that you thing should be standardized?

Dr. ALSBERG. Well, this would apply to any kind of food that is subject to the food and drugs act. It wouldn't necessarily mean in all cases standards. It may mean merely definitions. I personally am not of the view that we should have numerical standards for natural products. I don't believe that milk, for example, which is normal natural milk that hasn't been tampered with or manipulated should be standardized, or that it should be excluded from the market, because it did not come up to some numerical standard that has been made for milk.

This is particularly important for manufactured products, such as evaporated, or condensed milk; the manufacturers can make it of any density within certain limits. At the present time we have a standard which was arrived at by compromise and agreement with the manufacturers. There are many other products on which we have no standard. I do not believe we should have numerical standards for natural products, because such a standard is apt to be regarded as a formula for sophistication. What we desire to have is something that would enable the Agricultural Department to mak-

definition, and enable us to have a standard in addition to the definition where it is advisable.

The CHAIRMAN. Is it not true, that several products differ, depending on the kind of soil on which it is raised?

Dr. ALSBERG. Unquestionably. That is a point I wanted to bring out with reference to natural products. Coming back to the packages of spice, the department, a good many years ago, before my time, proposed a standard for the spice, ground pepper, stating that it should not contain over 15 per cent of fiber. That standard had to be a minimum standard. The standard had to be liberal enough to pass the lowest quality pepper that is ever grown. What was the result? Some of the manufacturers bought pepper shells, which are a by-product in the manufacture of white pepper—white pepper is only black pepper, from which the hulls have been removed—got an analysis of the pepper that they were purchasing and ground that proportion of hulls into it, which would still leave a fiber content of below 15 per cent. Now, that is a case where I believe a numerical standard does harm.

I believe that I can cite another case, the 16 per cent moisture standard, which the Bureau of Internal Revenue has adopted, which has done a great deal of harm. The result has been that some of the agricultural colleges have been teaching their students how to get 15.9 per cent of water into all of the butter that they produce. The result has been a general debasement of the butter produced in the United States.

Nothing specific has been proposed in this letter. The department wanted to find out whether this committee desired that the department prepare a bill for consideration. That bill would not, if I had anything to say in its preparation, be such as to compel the department to make a numerical standard for products for which it is obviously not in the public interest to make a standard, such as the pepper case. This is merely a suggestion from the department, that if the committee desires, it will be glad to assist in any way possible.

Mr. ANDERSON. What are the things which the department has in mind to standardize?

Dr. ALSBERG. All types of manufactured products. For instance, evaporated and other condensel milk, skimmed-milk power, canned vegetables, certain types of vinegar and baking powder, jams, jellies, preserves, marmalades, soda water, soda-water sirups, extracts, mincemeat, and many other things. In other words, all types of products which are manufactured, and of which the composition is within control of the manufacturer.

The CHAIRMAN. Did you say that you did not have in mind the standardization of butter under this bill?

Dr. ALSBERG. No, sir; I did not.

The CHAIRMAN. You spoke about the 16 per cent moisture content.

Dr. ALSBERG. That, of course, should be given further consideration. I was citing the moisture standard of the Bureau of Internal Revenue as an example of the evil that may be done in the fixing of a numerical limit or standard for a given product.

Personally, I believe that the manufacture of butter is sufficiently controlled by the manufacturer, so that a standard should be made.

Mr. HORIGAN. In the administration of the act, when we go into court to make a case of adulteration we would say that a can of

sirup, table sirup, which, of course, contains a certain percentage of moisture. Now, of course, some of the manufacturers might make a very thick sirup and others would make a very thin sirup. If we go to court on an adulteration proposition, we should be enabled to simply ask whether or not the sirup does contain 35 per cent or 23 per cent or 27 per cent, or whatever the formula was, and we would not have to introduce a lot of experts at the trial of every individual prosecution. The way we have to do now is to introduce those expert witnesses. If you have a standard fixed, which is given the force and effect of law, all that would be necessary in the prosecution of the case would be to prove that it fell below the standards and introduce the standard which was fixed by law and to show merely the facts that the particular article or sample did not conform to that standard. This would eliminate the constant repetition of proving by experts what is obvious to every man.

We all know that there ought not to be too much water in maple sirup, the same way that there ought to be some strawberries in strawberry preserves. Now, you can put a trace of strawberry juice in there and, there not being any standard, the rest can be glucose or sugar, or anything which they desire to put in it. In other words, the composition of the article now will be in the absolute control of the manufacturer. And lemon extract may or may not have anything more than a trace of lemon. Vanilla extract may or may not have anything more than a trace of vanilla, yet it is bought for the purpose of flavoring and the purchaser may get a very weak article. If we set up a standard, we can say that such article, in the opinion or judgment of the Secretary of Agriculture or Bureau of Chemistry, is the genuine article, but this conclusion has not the force and effect of law, therefore we will have to go to the jury on the question of law and produce a lot of extraneous evidence to show whether this particular article is or is not what it is commonly understood to be—the article which it purports to be.

Speaking about a trace of strawberry juice in strawberry jam, so far as law is concerned that is the situation, although, practically speaking, I think that the common sense of mankind will know what strawberry preserves are.

The CHAIRMAN. There is a wide difference in strawberries, depending upon the land on which they are grown and on the seasons. In certain sections of the country they grow beautiful strawberries that have no taste to them. Strawberries will look the same and taste entirely different. The same is true with regard to other fruit. I have in mind a case which came to my notice a few years ago. There were some plum trees beautifully loaded with fruit. The owner said that he was not marketing them because they were no good, that there had been too much rain. The fruit, although it had grown to a nice appearance, had no quality to it. Yet if those plums had been canned they would have had as fine appearance as any.

Mr. HORIGAN. That is, as I take it, the very purpose of standard. The purpose would be to preserve in the article strawberry jam, or plums, just those desirable elements, that for which it was purchased. You could provide in the standard that these articles should have the qualities for which the people purchase them. That is what we are getting after. Of course, we have to be flexible and reasonable in all things.

The CHAIRMAN. Of course. I don't know how far you intend to go. There is a feeling on the part of some that fruits grown on irrigated land are not as good as fruit grown naturally where nature has not been stimulated artificially. Fruits grown in one section of the country are not as good as some grown in other sections. How are you going to standardize them?

Mr. HORIGAN. Well, I only contend for the principle of standardization. I merely submit that to the judgment of the committee. Under the food and drugs act, the first thing that comes, many times, that we will want to know is to find out what the thing is—what the article is. We are sometimes left up in the air to know. In determining whether there has been adulteration or misbranding depends on what the normal composition of the article is. Therefore that has got to be determined by some standard for the purposes of this law. We have got to determine that question. Now, the question narrows down to this: Shall we determine it as we now have to in every case that is brought under the food and drugs act, where we have to prove in each individual case what the normal composition of an article is, or shall Congress and this committee, after careful and thorough investigation, confer authority on somebody to fix the normal composition of foods once and for all and thus dispense with the necessity of proving in each instance what an article is in determining whether or not it is adulterated or misbranded? That is, when the standard is found to be satisfactory enact it into law. In other words, make it a legislative instead of an administrative proposition. Of course we have got to be guarded so that mistakes will not be committed.

The CHAIRMAN. Have you any estimates as to how much of a task would it be to standardize as suggested?

Mr. HORIGAN. I think Dr. Alsberg could answer.

The CHAIRMAN. How much of a task would it be to standardize as suggested in the communication just read?

Dr. ALSBERG. It would be quite a considerable task. It is all a question of how rapidly you would want it done and whether it had to be done all in one year or not. It would cost a good deal if it was all done in one year. If it were done as a continuing proposition, over a series of years, which would be the better way, it would not be so expensive; but it would be a very large expense if it were done in any one year.

The CHAIRMAN. Our experience of standardizing has been somewhat discouraging. It has taken 15 years to standardize grain, and then we have only three standards. How would this compare with that work?

Dr. ALSBERG. My own impression of this particular work is that provision would have to be made to keep at it even after most things are standardized—keep some machinery going to modify the standards to permit of improvements and new processes. The evaporated-milk industry has been developed within the last 15 years, and the powdered-milk industry has been developed in the last five or six years. There are new products coming up all the time. We would not want the standards so inflexible that they can not be modified to take into consideration improvements in manufacturing process. It is pretty hard to say what it would cost, but there should be

ten or fifteen or twenty thousand dollars for a period of years on this proposition.

The CHAIRMAN. Would it be a practicable thing for the department to fix a standard and have it written into law?

Dr. ALSBERG. We have a number of such standards at the present time, and I should say that probably more than half of the work has already been done. We have issued our opinions on a great number of things.

The CHAIRMAN. Would it be more proper to enact those standards into law than to leave it to any one department to determine? Of course, a question of great importance is involved in this.

Dr. ALSBERG. Well, I should not advise that myself, because standards that are enacted into law are so inflexible. Manufacturing conditions change from time to time. Improvements are introduced and old methods of manufacture go out of date. Take vinegar, for instance. The standard that was made for vinegar in the sixties would have recognized nothing but the farmer's vinegar. Now, we have another method of making it, by the rapid process, which produces a desirable article of a somewhat different composition. A good many States have vinegar standards, enacted into law a good many years ago, and vinegar in those States, vinegar which is produced by manufacturers, good vinegar, can not be sold because they have enacted into law a standard which happens to fit only the farmers' vinegar made by allowing his cider to turn sour in a barrel. So, I don't think it is advisable to make standards and enact them into statutes, because of their inflexibility. I believe it would handicap progress in the process of manufacturing.

The CHAIRMAN. Now, take the butter question. There is a controversy as to whether there should be an 80 per cent or an 82½ per cent butter-fat standard.

Dr. ALSBERG. I think that in the case of butter an exception should be made and that a standard for butter should be written into the law, because we already have in our laws legislation which is rather confusing on that particular subject. I would not favor such legislation if we did not have the oleomargarine situation. If butter was on the same plane with the thousands of other food products, I wouldn't consider it advisable to enact a standard for butter; but conditions with regard to butter are such that I think in that particular case a standard should be made. I think there should be a legal standard for butter enacted into law.

The CHAIRMAN. Have you any other suggestions to be taken up?

Dr. ALSBERG. No; that is all.

The CHAIRMAN. We are very much obliged to you, Doctor.

Are there any others who wish to be heard in favor of the bill?

Mr. LANNEN. Now, I represent a very large food industry in this country and I want to say this: That if there are going to be any food standards established, we want to have hearings on those food standards before Congress.

The CHAIRMAN. I take it that they would require extensive hearings. That is a big proposition.

Mr. LANNEN. With regard to arbitrary power, we have had experience with that, and the standards that have already been promulgated by the department are not satisfactory to the industries, and we think we have a right to be heard before those laws are enacted.

We object to the delegation of arbitrary power to any set of officers to fix a standard, which has a bearing on the food industries of the country.

The CHAIRMAN. The matter of standards is a big proposition. I am sure that the committee would desire to hold extensive hearings on the proposed authority before taking any action—if action was contemplated. Besides, that seems to be outside of the bill under consideration. I believe that it is the desire of the committee to defer further consideration of the matter of standardization.

There are, I believe, a number of other witnesses who desire to be heard on the bill under consideration, but as there are a number of important matters that will come up in the House this afternoon, it will be necessary to recess until to-morrow morning at 10 o'clock. The committee very much appreciates the suggestions submitted by the witnesses who have appeared this morning. I thank you, gentlemen.

(Whereupon, at 1.15 o'clock p. m., the committee recessed to meet at 10 o'clock the following morning.)

HOUSE OF REPRESENTATIVES,
COMMITTEE ON AGRICULTURE,
Washington, D. C., Tuesday, October 28, 1919.

The committee this day met, Hon. Gilbert N. Haugen (chairman) presiding.

The CHAIRMAN. The committee will come to order. Mr. Lannen, the committee will be glad to hear you on H. R. 8954.

STATEMENT OF MR. THOMAS E. LANNEN, GENERAL COUNSEL, NATIONAL CONFECTIONERS' ASSOCIATION OF THE UNITED STATES, ETC.

Mr. LANNEN. Mr. Chairman, I appear before you this morning as the general counsel for the National Confectioners' Association of the United States. The National Manufacturers' Association of Soda Water Flavors, the Flavoring Extract Manufacturers' Association of the United States, the National Association of Manufacturers of Fruit and Flavoring Syrups, the American Spice Trade Association, a large number of sirup mixers, including some of the largest manufacturers of molasses in the United States, manufacturers of maple sirups, manufacturers of corn sirup mixtures of all kinds, and other national food manufacturing industries that are vitally interested in this bill.

I will say, Mr. Chairman, that I believe the volume of the annual business done by the industries that I represent here is approximately $900,000,000 a year, and therefore they are very vitally interested in this bill.

I do not wish to place any of these associations or manufacturers on record before this committee as being opposed to this bill, or to any bill that will prohibit fraud and deception and accomplish that object and nothing more, but I do want to state on behalf of the associations of food manufacturers that they are opposed to any bill

that works great hardships upon legitimate and perfectly innocent food manufacturers, and as we feel that this bill, as it now stands, would work great injury to the guilty and innocent alike, and would make criminal acts and things that are in themselves perfectly innocent, we are opposed to it until it is properly amended so as to safeguard the rights of the innocent and the legitimate food manufacturer.

Now, gentlemen, one point that I want to call your particular attention to is the fact that this bill is aimed, among other things, at packages themselves, disregarding any labeling that may be on the package. In other words, this a package bill that deals with the thing itself as a package, and under this law no wording on the label, no matter how clear and how legitimate it might be, would save a package from the penalties of the law if the package came within the provisions of the law.

I do not want to appear before this committee as opposing Dr. Alsberg's department. It is the fondest wish of all the industries that I represent to work in harmony with Dr. Alsberg's department and with the food departments of the various States. We have done that for many years; we have worked in harmony with these food officials, as I think Mr. Newman, who testified here yesterday and who was former food commissioner of my own State, will testify; but there comes a point at which we must draw the line and stand for what we consider to be our reasonable rights, and we must object to things that we consider to be nothing more than mere theories. Because we draw the line there these food officials come along and want to get laws that will simply carry out some idea that they have that may not be in itself a practical proposition.

Now, in order to give you an illustration of that I am going to show you something that is already here before this committee:

Now, gentlemen, this can would be touched by this particular provision.

Mr. HORIGAN. Excuse me, but yesterday what we had under discussion was the particular provision with regard to the slack filling of packages. I did not mean to say it would not be touched by a later provision.

Mr. LANNEN. As I understand now, it would be touched by this amendment.

Mr. HORIGAN. It would be touched by the later provision, not by the slight filled package provision, but the provision later on in the amendment.

Mr. LANNEN. The provision that relates to packages that are deceptive, you admit that. Therefore, gentlemen, you are asked to pass this law to put that manufacturer out of business on a can that is known in practically every city and hamlet in the United States. Every housewife is familiar with that particular can. The manufacturer has put that can on the market at an enormous expense of advertising. It is a can that stands in a field by itself where no manufacturer may infringe upon it, because it is so peculiar. You are asked now to pass a law here to put that can off the market and make that manufacturer adopt a round can or some other design of a can different form that one. I am very glad that Dr. Alsberg made the statement that he did, in order that this committee may have a concrete example of what you are asked to do by this law.

Now, mind you, gentlemen, the law would put that can off the market, regardless of labeling. The main point about this bill is that the labeling is not considered at all. It is the package that you are asked to deal with, disregarding the label.

Mr. McLAUGHLIN of Michigan. You mean that the form of the package would be deceptive?

Mr. LANNEN. That is what he said.

Mr. McLAUGHLIN of Michigan. Will you point out in the law wherein that is found?

Mr. LANNEN. It is proposed to amend section 8 of the national food law.

Mr. McLAUGHLIN of Michigan. Where are you reading?

Mr. LANNEN. I am reading now from line 22, on page 3.

In said section 8, at the end of paragraph 2, in the case of food, by striking out the period, inserting in lieu thereof a semicolon, and adding the following clause: "or if it be in a container made, formed, or shaped so as to deceive or mislead the purchaser as to quantity, quality, size, kind, or origin of the food therein."

Mr. McLAUGHLIN of Michigan. Now, apply it to this particular container. How do you say it deceives you?

Mr. LANNEN. I do not say it would deceive anybody, but I say it would be reached by this law, according to Dr. Alsberg, because of the way in which it is made, and he says it would mislead the purchaser as to the kind of food therein.

Mr. McLAUGHLIN of Michigan. In your opinion, would a court say so?

Mr. LANNEN. Well, I do not think so, Mr. Congressman. As I remember, we have had several hearings on this particular package before the United States Department of Agriculture, and we have invariably taken the position in those hearings that the practice is not illegal under the national food law.

Mr. McLAUGHLIN of Michigan. The hearings you talk of were before Dr. Alsberg?

Mr. LANNEN. Before Dr. Alsberg's department.

Mr. McLAUGHLIN of Michigan. At that time, or at any of those hearings, did you take the position that a provision of this kind would forbid the use of a package of that shape?

Mr. LANNEN. A provision of that kind was not in existance; a provision of the kind now proposed was not in existence at that time.

Mr. McLAUGHLIN of Michigan. His first statement to that effect was made yesterday, to your knowledge?

Mr. LANNEN. No; his first statement has been made several times in hearings. Dr. Alsberg is not the man who made the statements, but in charges served on the company the charge has been made.

Mr. McLAUGHLIN of Michigan. Were the attacks directed at this particular style of package?

Mr. LANNEN. Yes, sir; that was the particular package that was involved. They have taken that position for years, and I think Mr. Horigan can tell you the details of that. Evidently they made up their minds that under the national food law they could not reach that package, and being bound to put it off the market, they are asking you to pass a law of this kind so they can reach it and put it off the market.

One other illustration to show you that I am not captious about this criticism of the food department: I want to show you something else here which indicates what the food manufacturing industries of the country are up against. Here is a bottle of sarsaparilla, well known and advertised all over the country. Here is another bottle of ginger ale made by the same company. This ginger ale is colored with harmless burnt-sugar coloring, in other words a caramel color, just as the sarsaparilla is colored with the same harmless sugar coloring, only it contains more sugar coloring than is in this. It is darker because there is more of the harmless sugar color in it.

If I were to fill both of these bottles, the empty ginger-ale bottle and the empty sarsaparilla bottle with water, they would be the color of ginger ale or sarsaparilla without the sugar color, in other words, they would be water white, or practically so. It might be a little cloudy, but very little, without the sugar color. Now, Dr. Alsberg's department has adopted a standard which has automatically taken effect by virtue of State laws in several of the States which have laws providing that the standards for food and drugs shall be the standards promulgated by the Secretary of Agriculture of the United States. The Secretary has promulgated a standard under which both of these products would be illegal because they are colored with burnt sugar coloring, and are not labeled "Artificially colored." Now, ginger ale has had that color in it ever since it has been made in this country, and sarsaparilla has had that color in it also. The coloring matter in both of those is as normal as the flavor. Every manufacturer of soda-water flavors in the United States, without a single solitary exception, will tell you that there never has been sarsaparilla or ginger ale put on the market that was not colored this way. Now, they are forcing us to class this product as an adulterated product and label it as artificially colored.

Mr. McLAUGHLIN of Michigan. Is the burnt sugar used for any other purpose than for coloring?

Mr. LANNEN. For coloring only, to give the ginger ale the peculiar color which distinguishes it from the sarsaparilla, and from the other flavors. They all have different colors. If they were not colored they would be water white.

Mr. McLAUGHLIN of Michigan. That is not an ingredient of the product, then, as we usually use that term, but it is used solely for coloring purposes?

Mr. LANNEN. Solely for giving it the tint of ginger ale. That is the sole purpose. Of course, a labeling on there, "Artificially colored," would not accomplish any good results. I do not think it would make a bit of difference to any member of this committee whether that ginger ale was labeled "Artificially colored," or labeled as it is now. It is just one of those things that are mere theories. All of the manufacturers would be forced to put that on these bottles and go to the extra expense of labeling, and if the label happened to come off, as on this one here, when it was put in the ice box of the soda-water dealer, he would be guilty under the law.

You take the ordinary little country bottler out through the towns who make soda water, and he has no machinery for putting a label on.

Mr. HORIGAN. You make the statement, Mr. Lannen, that after that thing was shipped in interstate commerce and rested in the

refrigerator of the ultimate retailer, and the label fell off, he would be liable under the law, when the act speaks as of the time when the thing was in interstate commerce?

Mr. LANNEN. I have just said a little while ago that the standard promulgated by your department is the standard, by virtue of that promulgation, in a large number of the States, and in those States having that standard that bottle would be illegal.

Mr. HORIGAN. Not under the Federal food and drugs act?

Mr. LANNEN. Under the State food and drugs act. Your department has claimed that the standards you promulgate are legal, and one court has held that they are legal.

Mr. HORIGAN. That is another proposition. It would have to be sold to the ultimate consumer without the label, too, would it not? Could not the label be reattached, or could not the consumer be advised what the thing was by another label on it?

Mr. LANNEN. Well, when the soda-water man on the 4th of July reaches down in his tub of ice and finds that one of the labels has washed off, he might, of course, fish it out and put it back on the bottle.

Mr. HORIGAN. But so far as the Federal act is concerned, that would not be a violation of the act if the label fell off after it got to the ultimate consignee?

Mr. LANNEN. After it got beyond the jurisdiction of the Federal act, no.

Mr. MCKINLEY. Would it not be a violation because the State laws provide the same as this bill?

Mr. LANNEN. As a matter of fact, I have under consideration asking some one to introduce a bill in Congress to relieve us of this situation, and standardize soda water.

Those are just two instances to show you why I want to be careful here to see what kind of a law we are getting.

Mr. MCLAUGHLIN of Michigan. May I ask another question? The position you speak of having been taken by Dr. Alsberg was evidently taken under some law that is now in force, as he interprets it. Does this bill touch on the same matter and go further?

Mr. LANNEN. No. I am simply showing why I am arguing this matter before your committee, and why it is necessary that you gentlement take into consideration the rights of the food manufacturers. We are up against things of the kind indicated right along.

Mr. HORIGAN. Mr. Chairman, I happened to be out of the room when Mr. Lannen was speaking of the—I would ask him if he would care to be fair to the committee and give the past history of that concern, and how he came to advise them as to the label, and if it is not a fact that they were in conflict with the Department of Agriculture regarding the representation that their product was pure, by the labels, in addition to the shape of the can?

Mr. LANNEN. Well, I will say this much about it, that I remember that we changed the name of the concern. You will notice the word you refer to there in small type. You would have to look hard for it. We changed that word in the name of the company in order to avoid conflict with the department.

Mr. MCLAUGHLIN of Michigan. What was the former name?

Mr. LANNEN. It is right there now on the small can. That is the name that we used formerly on the package.

Mr. McLAUGHLIN of Michigan. That was the name that was put on after?

Mr. LANNEN. No; the name on the large can was the name that was put on. That is one change we made. That was an absurd change, but we wanted to keep out of trouble.

The CHAIRMAN. Why was it made up in this form?

Mr. LANNEN. It was made up in this form in order to have a distinctive package, Mr. Chairman. It is one of the great aims of the food manufacturers to have a packeage that is distinctive from any other package and that can not be infringed upon.

That is their brand, simply, the same as the picture of a rose on a label would indicate it is a rose brand. It is their brand.

The CHAIRMAN. There is a purpose in putting it there?

Mr. LANNEN. The purpose was, of course, to emphasize the brand.

Mr. WILSON. I know, but is not that the form of package that was used by some concern a good many years ago, when they put up a very high-class——

Mr. LANNEN. No; this is the firm that you are referring to—the same firm.

Mr. McLAUGHLIN of Michigan. I do not quite understand what you have said about the change of name. You speak of the difference between the name on one and the name on the other. As far as I am able to see, they are about the same. Suppose those names were used as they are on these cans, is there another name that the department objects to?

Mr. LANNEN. Let me make that clear to you. The department objects to this name on the small package.

Mr. McLAUGHLIN of Michigan. The small package?

Mr. LANNEN. The small package.

Mr. McLAUGHLIN of Michigan. What is the name on the small package?

Mr. LANNEN. The * * *. They said that name was false and misleading, and they made us change it to this one. That is the can, and that is the package Dr. Alsberg wants to put off the market right here now. I do not see that the past history has anything to do with that particular issue, unless you want to go back and penalize a food manufacturer for something he has done in the far past.

Mr. YOUNG. There have been exhibited here a variety of packages of food supplies, spices, peppers, and so on, and it has been brought to the knowledge of this committee that these packages are all slack filled, many of them with practically nothing in them; and evidently the people who got up these products have gotten them up in this form to fool the trade, getting money from the people for something they are not selling. They are simply selling the package without anything in it. Dozens and dozens of those packages are here. Others are gotten up to fool the eye, as these bottles of extracts. Here is a large bottle with practically nothing in it, and here is a bottle half that size with twice as much in it. Are you undertaking to testify before this committee that the concern that you are representing will stand for these slack-filled packages that are being imposed on the public, for which they are paying, and for which they are getting no return? Do you not think, in all common honesty, something ought to be done to stop those people who are doing these

things from putting them up in this kind of packages, when they are not selling real stuff to the people?

Mr. LANNEN. I am going to propose an amendment that will cover that.

Mr. YOUNG. That is what I am interested in. I think that what is a crooked deal like that ought to be stopped. If this practice goes on it will grow worse and worse, and honest tradesmen will have to follow after these other fellows.

Mr. LANNEN. I think a little unfair advantage is being taken of the committee here, for this reason: It is not a year since the war ended. During the period of the war the industries that I represent had very very hard times to market their products. It was necessary to practically suspend some food laws. It was necessary for the flavoring extract manufacturer, for example, to put his extracts out in any kind of a bottle he could get, whether it was an extract bottle or not. Glass bottles were hard to obtain; tins were hard to obtain, very hard to obtain. The food commissioners of the country, realizing that situation, and realizing that the people had to have food, gave the food manufacturers the privilege of using packages that in ordinary times would not be legal.

Mr. YOUNG. Let me ask you right there now, did any of these people who were putting out these packages we have on exhibit here, ever make a mistake in overfilling a package? Why were they all underfilled?

Mr. LANNEN. That would be beside the point I am making. I want to tell you the situation, and then you can judge of the situation yourself. In one State of the Union, the State of ———, they had laws there requiring sirup products to be labeled in a certain specific way. They had a number of other special laws in the State, and under those laws it was necessary to have special cans and special labels. The manufacturers ran out of cans, and as the result the people of ——— were not getting table sirups. I went on behalf of one manufacturer in the sirup industry, with another gentleman, and took the matter up with the governor of ———, and with the food commissioner of that State, and we told them the situation, and that we could not get special lithographed cans, and we could not use ordinary labels in ———, and that the only way, in which we could do business in the State was by ignoring the food law of that State. The governor and the food commissioner both said, "We want sirup. For God's sake, give us sirup, and never mind the food laws of the State."

The food commissioner wrote me a letter, which I am sorry I have not got with me here, in which he said they would advise their inspectors to pay no attention to the ordinary misbranding, etc., and that unless they got a case of real adulteration, such as poisons, where they found formaldehyde in milk, or something of that kind to make no complaints.

In ——— the situation was the same, and also in other States. The codfishing industry of Gloucester, Mass., was placed in a position where they had to get the food administrator to allow the use of products they had not used before, and which in former times were not used in codfish. They went into ——— and sold codfish there, and as I understand the matter—I can not vouch for it now,

and I am just simply telling you what I heard about it—the Food Administrator told the food commissioner of the State to permit that codfish be sold in the State in order to give the people of that State codfish.

I am familiar with these spice packages that are here before you. I was attorney in the case in Chicago that Dr. Alsberg referred to yesterday. The gentlemen who were here yesterday, and some that are here to-day, came to me and took up that case with me after it was filed. I examined the packages at that time and told them they could not defend those packages under the national food law, and they did not defend them. In fact, we never appeared in court. I never entered my appearance in court. Those manufacturers were up against this situation: They had their cans. It was a question with them of raising the price from 5 cents to 6 cents, or 7 cents, or 8 cents, etc., or 10 cents. They did not take that course, which was the course which other industries took. For instanct, the candy industry was obliged to raise the 5-cent bar of candy from 5 cents to 6 cents and 7 cents, and then, after awhile, in order to put it out at all, they were obliged to begin to cut down size in order to put out certain bars of candy. Those were the conditions that the war brought about and that everybody recognized. Now, then, these people endeavored to put out 5 cents worth of spice in that can. They endeavored to give the consumer 5 cents worth of spice, even though it did not fill the can. Now, some other manufacturers may have given more spice for 5 cents than other people, but that is a matter of competition; that is a matter that can not be prevented.

Suppose a manufacturer, in time when spices were cheap, before the war, had stocked up in spices and had a large supply of spices on hand. It is natural that he would be in a position to sell more spice for 5 cents than somebody else who had to buy under war conditions. The grain dealer who has bought corn on a cheap market has an advantage over the man who has bought it on a high market.

Mr. YOUNG. Do you think, under those conditions, the manufacturer ought to have the right to use the same size can, and when the housewife goes in to purchase she believes she is purchasing the same amount of material when, as a matter of fact, she is being defrauded, and the manufacturer has only to fill that can in order to have it in a normal condition?

Mr. LANNEN. The point I am making, Mr. Congressman, is that every food commissioner recognized this condition, and they said to give the people foods in any kind of package, as the people needed food. The candy men, for instance, were forced to take packages of any kind they could get to sell their candy in. Paper was scarce, as you all know. Those were war conditions.

Now these people are coming down here and without laying that situation before your committee here, are taking advantage of the food manufacturers who did the best they could under the strenuous conditions of the country.

Some of these things may be general practices. I do not know, but if they are, they ought to be stamped out. But I will say to you that most of these things that are here before you are in that condi-

tion because of the conditions of the war, for the manufacturers were forced to that expedient. It is not fair now for these officials to come in here now and charge the food manufacturing industry with these unavoidable things.

Mr. WILSON. Do you think that a fellow who put up that golden seal potato chip in the bushel basket, two ounces of them, did it because of war conditions?

Mr. LANNEN. He may. He may have had those packages on hand, and they may have been all the potato chips he could afford to give them for the price he charged. I do not know. I want the facts.

Mr. WILSON. Do you think it is a good idea to continue to let him do that?

Mr. LANNEN. No; I do not believe he wants to do it in normal times. There is not any honest manufacturer who wants to do that. But it is not fair to take advantage of him when he did the best he could under the circumstances. I do not know all about it. I would like to know the facts.

Mr. YOUNG. That is why I am going into this very case. An honest manufacturer does not want to do that, but suppose a dishonest manufacturer finds out he can do that. There is no law that prevents him from doing that, and if he persists in that course of conduct when the war is over, what protection has the public, and what protection has the honest manufacturer against that kind of fellow? Do you not think we ought to have some law prohibiting that kind of thing from being done?

Mr. LANNEN. I am not defending those people who are doing that now, not by any means.

Mr. YOUNG. Do you not think there ought to be some statutory law that will prohibit a manufacturer from doing a thing of this kind, because it is dishonest competition?

Mr. LANNEN. I am in favor of such a law, and every manufacturer that I represent. I am going to propose an amendment to this bill in a little while that will make it such a law.

I was going to tell you about these two cans of peaches. Here is an illustration. Bear in mind that this law deals with packages, not with the labels. It is a law that says that the container must stand on its own bottom so far as legality is concerned. Here is a can of peaches. This is labeled 1 pound and 14 ounces. Here is another can of peaches of the same size and shape, and so far as I can see and feel, probably better packed than this one, but this can only contains 1 pound and 12 ounces. Now, is this can illegal because this can contains 2 ounces less than this one? Is the housewife who goes in and who is used to buying this can of a pound and 14 ounces, without reading the labels—and it is said here that they never read the labels—is she mislead when she buys this can because it contains less? I bought these cans last night at a grocery store, and I paid 49 cents for this can of 1 pound and 14 ounces, and I paid 35 cents for this can of 1 pound and 12 ounces. The grocer told me they were good peaches, both cans of peaches. So, after all, it is both the quality and quantity of the goods that controls the situation.

Now, I presume that the reason this can contains two ounces more than this can is because, as is stated on the label here, it is packed with heavy sirup. Sirup is soluble in water, as you know, and you

can increase the weight by putting sirup in. The peaches are probably just as good. This contains a little more sugar than this one, and is therefore heavier; so you see you have got to go beyond the appearance of a package and inquire into the kind of food which is in the package. In other words, you have got to standardize every kind of peaches that may be put on the market and say that they must contain a certain amount of sugar, if you are going to have the conditions clear. You would have to say, "This can must contain just exactly as much sirup as this can, and this can must weigh a pound and 14 ounces, if this can weighs a pound and 14 ounces, so the housewife can not possibly be deceived by the appearance of the package."

Now, what is true of that is true of other things. Food products vary in composition and, unless you control the composition of a food product, you can not limit the size of a package that a man is putting out to carry out the purpose of protecting the consumer.

Here is another situation. Here is a can of peaches that weighs 1 pound and 14 ounces, and here is a can of peaches that weighs 2 pounds and 4 ounces. Now, if a housewife is buying peaches in one store and she buys this can, and she goes into another store and buys this can, she would never know that there was a difference in the size of those two cans—never in the world. You would have to standardize both cans; you would have to have identical cans of identical size; and you would have to provide for the same amount of sugar in each. Understand me, I am not opposing that; I am not opposing standardization of packages. I am not sure but what it would be a good thing to provide that there should be cans of half a pound, a pound, two pounds, etc. I think perhaps a majority of my sirup people would be in favor of standardizing cans and requiring them to be sold in definite units, but that would not accomplish the result. You would have to go in and standardize the contents, as I said before.

The CHAIRMAN. After all, there is not a great deal of difference in the size of the two cans.

Mr. LANNEN. In those two there is no difference.

The CHAIRMAN. I mean those two.

Mr. LANNEN. I am making this point. Suppose a case were framed this way, and it should be framed very easily. I have tried a great many cases under the national food law all over the country, and I want to tell you this, that when a food manufacturer goes on trial in a Federal court in a large city, where the jurors are farmers, and the Federal food department sends an expert out from Washington from the Department of Agriculture, and that witness takes the stand and testifies that, in his opinion, the article of food involved is adulterated and misbranded, nine times out of ten the food manufacturer has less chance to win that case than the proverbial snowball has in the hot place. They would come into the court with a case on these two cans, and they would say that a certain woman was sold this can of peaches, and she had been used to buying this can, and that she thought she was getting the same amount of peaches that she got in this can, and they would furnish those two cans to the jury, and they would claim that she was deceived when she bought this one, because she thought she was getting as much as

she got in this other one. Those two cans there would make a better case than the other two cans, because they are exactly alike.

Mr. McLAUGHLIN of Michigan. Is there anything in this bill that touches the particular point you are making now?

Mr. LANNEN. There certainly is.

Mr. YOUNG. Let us take those two cans. Suppose she was in the habit of buying the larger can here, and went in to some dealer, and he did not have this larger can on hand, and he knew she was in the habit of buying it and thought she was buying it, but he sold her the smaller can, what is the reason that dealer would not be guilty?

Mr. LANNEN. He would be possibly under the State food law, if he misrepresented it to her.

Mr. YOUNG. Should he not be guilty?

Mr. LANNEN. If he misrepresented it to her, but I want to get before this committee the purport of this bill, that the can itself is the test of its own legality.

Mr. WILSON. Should the manufacturer be held guilty for the actions of the retailer?

Mr. YOUNG. No; the manufacturer in that case would not be guilty of any wrong.

Mr. WILSON. They are not after the retailer in the case.

Mr. HORIGAN. May I ask the witness a question? Are both of those cans filled to their true capacity, Mr. Lannen?

Mr. LANNEN. I have not opened them. They seem to be very well packed.

Mr. HORIGAN. If both cans are filled to their true capacity, where is there anything in this bill that would condemn them as misbranded?

Mr. LANNEN. Where is there anything in this bill? The amendment says here, "or if it be in a container——

Mr. YOUNG. Where is that?

Mr. LANNEN. Line 24, page 3, at the end of the line, the amendment proposed is this, "or if it be in a container made, formed, or shaped so as to deceive or mislead the purchaser as to the quantity * * * or origin of the food." I am leaving out some immaterial words. "As to the quantity of food." That is the part.

Mr. HORIGAN. Would this deceive?

Mr. LANNEN. That might under this bill be said to deceive as to the quantity of food in the container.

Mr. HORIGAN. Mr. Chairman, Mr. Lannen is making a rather specious argument, because the proposition is this: The cubic capacity of those cans may be equal, but when you are giving your results in terms of avoirdupois weight it is not the same thing. We know that a pound of feathers will take up more space than a pound of lead. You are basing your argument on that proposition. But I contend that if those cans were filled to their true capacity they would not come under the provisions of this bill, because they would not cause deception. She would get a heavier amount of food in one can, and she would get a less concentrated food in the other.

Mr. LANNEN. Let me ask this question: Under the national food law must this be labeled in terms of weight or terms of measure?

Mr. HORIGAN. In terms of weight, measure, and numerical count. They are solids and liquids combined.

Mr. LANNEN. I am asking you about this particular package of fruit here. Must this be labeled in terms of weight or terms of measure?

Mr. HORIGAN. In terms of weight, measure, and numerical count. They being a solid, for instance, they are supposed to be labeled by weight.

Mr. LANNEN. And it is labeled by weight, and therefore your point does not apply.

Mr. ALSBERG. We have not made any such ruling that it must be labeled by weight. If a manufacturer chooses to label it by weight he has that privilege under the law. When it is an entirely solid substance the only way he has to label it is by weight.

Mr. LANNEN. The only case that I remember in which a manufacturer of a product of this kind is permitted to label in terms of measure is when his food product is a viscous or a semisolid substance; is not that correct?

Mr. HORIGAN. Here is the regulation, Mr. Lannen.

Mr. LANNEN. I do not want to take up my time. I have some other people here who want to be heard just a minute.

All I have to say about the suggestion that my argument is specious is that it is not half as specious as some of the contentions put forth by the food department; not half as specious.

Now, you had a candy package here, gentlemen, last night. I wired to Boston last night to get the manufacturer or his representative here of that package of candy, in order that he might come here before this committee and face this committee and tell you the situation in regard to that particular package of candy, and I have also brought here some of the leading confectioners of the United States to testify before your committee and show you the situation in the candy industry with regard to packages of candy, and to show you illustrations of different kinds of packages, and I will ask Mr. Bogart to present the situation from their standpoint.

Mr. MCLAUGHLIN of Michigan. I understood that you were going to suggest an amendment to the bill.

Mr. LANNEN. I suggest this amendment, on page 2, line 7, after the word "package," insert the words "with guilty intent and for fraudulent purposes," and another amendment on page 3, line 25, after the word "container," insert the words "purposely and fraudulently and with guilty intent."

Mr. YOUNG. From a legal point of view, is not that burden on the Government anyhow?

Mr. LANNEN. No, sir; it is not. That would read, then, "Or if it be in a container purposely and fraudulently and with guilty intent, made, formed, or shaped so as to deceive and mislead the purchaser as to quantity, quality, size, or origin of the food therein." That will protect the legitimate manufacturers and the innocent manufacturers, and it will catch fraud.

The CHAIRMAN. Those are the only amendments you have to offer?

Mr. LANNEN. Those are the only amendments I have to suggest.

Mr. HORIGAN. Mr. Chairman, with the committee's permission we would like to have permission to submit the views of the department on that, if the committee would care to hear them.

The CHAIRMAN. It was suggested that those favoring the bill be heard first, and those in opposition after they are through.

Mr. McLAUGHLIN of Michigan. As I understand, this entire law does away with intent altogether.

Mr. LANNEN. It does.

Mr. ALSBERG. In the so-called Sherley amendment to the food and drugs act, as it now exists, an article is misbranded not only if there be fraud, but if the label is false and fraudulent. Those are the words. That applies to ordinary mistakes and to the entire matter.

Mr. McLAUGHLIN of Michigan. Otherwise, or largely, at least, intent is done away with.

Mr. ALSBERG. Yes; so far as intent can be done away with without specifically saying so.

Mr. McLAUGHLIN of Michigan. You have had experience in these matters. How has that law operated in that respect?

Mr. LANNEN. We have not been permitted in the trial of cases to go into the intent of the manufacturers.

Mr. McLAUGHLIN of Michigan. Has that worked serious hardship?

Mr. LANNEN. It has worked serious hardship. The manufacturers would not be permitted in the trial of cases on these spice containers to show innocent intent, and why these packages were slack filled, and things of that kind, unless the court would listen to him after the trial before the jury for the purpose of reducing the fine.

Mr. McLAUGHLIN of Michigan. Are you in a position, or do you care say, what there is to justify a law not requiring the showing of intent?

Mr. LANNEN. Personally I have contended for the guilty-intent feature all the time for years. These food laws are all special laws that have created offenses that are not defined at common law, and you can make them any way you want them. You can make them with guilty intent or without guilty intent as a feature. I have always contended that guilty intent, or at least that some element of what you might call bad faith, must be shown to be involved in these cases in order to convict. They should show something of a malicious intent on the part of the manufacturer. I have seen some of the finest gentlemen that ever stood in shoe leather, as honest men as God ever made, whose intentions were the best in the world, convicted under that national food law for trifles, and their names published to the country as violators of the law. We should have the same privilege here as the patent medicine people have, at least in regard to guilty intent or fraud. We should be accorded the same privilege.

Mr. Bogart, are you going to make a statement for the candy people?

The CHAIRMAN. Thank you, Mr. Lannen. We will be very glad to hear from Mr. Bogart.

STATEMENT OF MR. S. V. BOGART, REPRESENTING E. GREENFIELD & SONS, NEW YORK, N. Y.

Mr. BOGART. The best statement I can make is to show the general range of candy boxes, from the small 1-pound package to the larger 1-pound package, and let you gentlemen decide for yourselves if that is not the condition that exists in every drug store and

retail confectionery that you pass by in the day, or where you purchase your sweets, and if I may be permitted, I should like to show those samples. There is a half-pound package, and there is a larger one. There is one package, there is another one, still another one, and still another.

Mr. YOUNG. These are all 1 pound?

Mr. BOGART. These are all 1 pound. There is still another. There is a pretty wide range of 1-pound packages, and yet they are all labeled and contain the full pound of candy.

Mr. LANNEN. There, gentlemen, is the package that was condemned yesterday, containing 1 pound of candy. Here is a package that contains 1 pound of candy, and here is another one. If the housewife is deceived in buying this one, is she not deceived in buying this one and buying this one?

Mr. MCLAUGHLIN of Michigan. Still the criticism yesterday was directed to the false bottom.

Mr. LANNEN. We are not defending those false bottoms. The association is opposed to the false bottom. Mr. Bogart can tell you something about that in just a minute.

Mr. BOGART. The National Confectioners' Association in convention, held for the general good of the trade throughout the United States, had this very same question brought up.

Mr. LANNEN. When was that convention?

Mr. BOGART. I think the convention was the 17th day of May.

Mr. LANNEN. 1919?

Mr. BOGART. Yes; 1919.

Mr. LANNEN. The Springfield convention?

Mr. BOGART. At Springfield. At that convention the false-bottom packages were roundly condemned, and it was generally conceded and it was the concensus of opinion of those present that false-bottom packages be discontinued, and while they had crept into the trade during the past couple of years, it was done in the spirit of competition, perhaps. Perhaps it was done because they wanted to use up boxes that they had on hand, and it was easier to put in a false bottom than it was to get new boxes.

It was difficult for the box makers to take care of their orders, and in that way they crept into the trade, but it is very safe to say here that it was not done with the approval of the trade, and I feel quite certain in making the statement that it is discontinued to-day. I do not know of a single house that is doing that to-day, and I am quite certain that the package you have there is a package that is obsolete, and yet I have not had a chance to discuss the matter fully with the manufacturer who put that out.

Mr. MCLAUGHLIN of Michigan. When was that bought? Was it stamped on the bottom?

Mr. WILSON. It says here in the letter October 17—this month, this year.

Mr. LANNEN. Of course, Mr. Chairman, that might have been put out six months ago, or a year ago, as far as that is concerned.

Mr. YOUNG. Prior to the war the false bottom was unknown?

Mr. BOGART. I might say it was, because it was a condition of competition, as I say, practiced by some houses.

Mr. YOUNG. That is the point I am after. If some manufacturers engaged in competition with people who are putting out this candy—

I take it there is no false bottom in these boxes you show here—if they engage in competition with these people who are putting up candy in this form, is it not unfair competition to allow some other man to put in a false bottom and deceive the public? Is it not unjust both to the public and to the people who fill their boxes as these boxes are filled, to allow that false-bottom system to be permitted?

Mr. BOGART. Well, personally, I would say that I would be very glad to see it abolished and never brought to light again.

Mr. LANNEN. Would not the consumer, though, get the same amount of candy for her money, Mr. Bogart, in either box?

Mr. BOGART. She would get the same amount of candy, because labeling has been a very strict matter with confectioners, and I think they are living up to the letter of the law in every respect.

Mr. LEE. Would it not generally cheapen the package if they had to put in a false bottom?

Mr. BOGART. Yes, sir. That is a very good reason why it should be discontinued.

The CHAIRMAN. As I understand, you are in favor of the bill as suggested here. Have you any amendment to offer?

Mr. BOGART. I am very much in favor of the bill as amended.

Mr. LANNEN. You mean the amendments I suggested?

Mr. BOGART. Yes, sir; because I think that does away with a good many false charges; because I think this gentleman on the right is quite correct.

The CHAIRMAN. Do you believe that the bill with amendments would give the protection required or desired?

Mr. BOGART. I think it would, from the little thought I have been able to give it; I think it would give the protection desired.

The CHAIRMAN. It would change the bill materially, of course.

Mr. BOGART. Yes, sir; it would change it some.

Mr. YOUNG. Of course, you confectionary people would not want any law that would prohibit you from putting up an attractive package?

Mr. BOGART. Well, I do not think anyone would want us to put up an unattractive package.

Mr. YOUNG. I think not myself.

Mr. BOGART. The eye has a lot to do with the sale of every product. If you go to buy a box of candy for a sweetheart, I think you would go in and buy the prettiest box you could get.

Mr. YOUNG. I will say I don't know much about candy, and I usually buy it by the appearance of the box, and I suppose you would do it the same way.

Mr. LANNEN. Are you through, Mr. Bogart?

Mr. BOGART. That is all I desire to say.

Mr. LANNEN. I will ask Mr. Wheelock to address the committee.

The CHAIRMAN. Thank you, Mr. Bogart. I believe Mr. Wheelock is next.

STATEMENT OF MR. LOUIS W. WHEELOCK, REPRESENTING STEPHEN F. WHITMAN & SON (INC.), PHILADELPHIA, PA.

Mr. WHEELOCK. Mr. Chairman and gentlemen, I was called by wire from Philadelphia last night to appear before your committee and show a line of packages of confectionery—that is, to show the

different packages, and I gathered together packages which represent our line as representative packages.

Mr. WARD. Would this law mean that candy would have to be packed in the same kind of containers, and of the same size?

Mr. LANNEN. Dr. Alsberg thinks not. I think we would at least be at the mercy of the department on that. If he took the notion that certain sized packages and packages of a certain shape should be put off the market, we would have to fight for it. We want to protect these packages that you see here, gentlemen. That is our object in coming before you. They are all innocent packages. But we want to catch the fraud and the false bottom like that, and put it off the market. We are just as much interested in doing that as Dr. Alsberg is, for the sake of the trade.

Mr. WARD. For instance, some of these candy makers put up candy in containers that are worth twenty times as much as the candy. How would that law affect that?

Mr. LANNEN. Here is where it would affect it: There would be containers brought into court that cost $5——

Mr. WARD. They are used for jewelry cases, some of them. Some of the containers are very expensive.

Mr. LANNEN. Their department probably would not go to the extent of bringing a case against a fancy work basket, containing a pound of candy; I do not think that they would go to that extent, but it is on some of these boxes where we would get into trouble. It is something on the border line. We do not want to run into a situation of that kind. We want the crook to be caught, but we want the innocent man to be let alone.

The CHAIRMAN. After all, you would have to leave that to some one to determine?

Mr. LANNEN. It is expensive, Mr. Chairman, to have the court determine it.

The CHAIRMAN. It is expensive to enforce any law.

Mr. LANNEN. Yes.

The CHAIRMAN. It is necessary to have laws to prevent fraud and deception.

Mr. LANNEN. Not for the mere purpose of settling academic questions. The manufacturer does not want to have to fight for his rights on that can, for the mere purpose of being permitted to put it on the market.

The CHAIRMAN. The manufacturer is willing to fight to protect himself against fraud and deception, and he has to do it. The only way is to have some law that will afford protection to him.

Mr. LANNEN. I submit, Mr. Chairman, that there should be some real substantial offense against the public before we should be compelled to go to the expense of a fight in court. That is my contention.

The CHAIRMAN. There is not much difference between the representations made here. They all seem to be in favor of the same thing, to do away with deception, and that is all that is sought to be done.

Mr. LANNEN. The trouble is, with this law, in doing away with deception, as it stands now, it would leave the door open to the hurting of innocent manufacturers.

The CHAIRMAN. We do not want to injure the innocent.

Mr. LANNEN. Then make them prove the intent to deceive.

The CHAIRMAN. I think you have admited there are some practices that should be discontinued.

Mr. LANNEN. No court would hesitate under the amendment suggested to convict crooks.

The CHAIRMAN. I assure you the amendments will be given consideration.

Mr. WHEELOCK. Our company has been in the manufacturing confectionery business since 1842, and I happen to have the original package which represents the identical form of the Whitman package, which has persisted since the foundation of the company.

The CHAIRMAN. How much does that package contain?

Mr. WHEELOCK. That particular package contains 2 pounds. The tendency has been toward a larger appearing package, due to competition. Our company, with the others, has met that tendency. Package candy is largely a gift proposition, and the giver wants his gift to appear as large as possible, and we have to cater to that instinct. Our standard package, which is a branded package under the name of "Sampler," was gotten up without regard to net weight. We designed a package which would be distinctive and identified with our company, and afterwards we found it contained 17 ounces. We branded it "17 ounces." It doesn't conform to any standard weight.

Mr. LANNEN. You are aware of the fact, Mr. Wheelock, that as so branded it would not be legal?

Mr. WHEELOCK. It is perfectly legitimate from our point of view. We give a package of candy which is practically in competition with a large package.

The CHAIRMAN. There is nothing about that form of package that would deceive anybody.

Mr. MCLAUGHLIN of Michigan. Why do you say that it would be forbidden now?

Mr. LANNEN. Under the regulation that would have to be labeled "One pound, 1 ounce."

Mr. MCLAUGHLIN of Michigan. Wouldn't "17 ounces" do?

Mr. LANNEN. No, sir.

Dr. ALSBERG. May I interject a moment? The bureau made a regulation with the evident thought in mind that if a package was labeled "72 ounces," for instance, "72 ounces" requires that purchaser shall do a sum in mental arithmetic to find out how much is in the package, so that we felt the fair way to declare the weight on package was in the largest unit in it, and I think that is the fairer way to declare the amount in that package; to say "One pound, 1 ounce."

The CHAIRMAN. In general terms?

Dr. ALSBERG. Yes, sir. Speaking technically, Mr. Lannen is right on that particular point. The object of that regulation was that somebody might attempt to camouflage the quantity by calling a gallon so and so many gills. The average consumer doesn't know how many gills are in a gallon, or in a quart.

Mr. LANNEN. We are not opposed to that.

Dr. ALSBERG. You are right, technically, Mr. Lannen. I only wanted to explain the reason for that regulation.

Mr. MCKINLEY. Take these two packages, for instance. Wouldn't the average person think they were getting a good deal more because

this one is labeled 2¼ pounds, than they would in this one that is labeled 1 pound and 14 ounces? Aren't you deceiving them?

Dr. ALSBERG. How is that?

Mr. MCKINLEY. This package says it contains 2¼ pounds. To the average person does 2¼ pounds seem more than 1 pound 14 ounces?

Dr. ALSBERG. I suppose that is true; but how would you meet the situation?

Mr. MCKINLEY. I don't know; but you said you didn't allow them to use ounces.

Dr. ALSBERG. I didn't make myself clear. I didn't say that. We would object if that were labeled 30 ounces, because the average person would have to do a sum in arithmetic to find out what it contained.

Mr. MCKINLEY. Wouldn't the average person be able to distinguish between these two if they were told this contained 30 ounces, and this 36 ounces, instead of 2 pounds and a quarter?

Dr. ALSBERG. We don't think so, because a person who reads this would say that it was a little bit under two pounds.

Mr. MCKINLEY. They would, if they knew how many ounces were in a pound.

Dr. ALSBERG. That is a matter of judgment. We thought there was less chance of deception in the majority of cases on that regulation than on the other, because how are we going to stop a person from saying a package that contained 6 pounds contained 96 ounces? We had to choose between the two things, and it was our judgment that that was the more informing.

Mr. MCKINLEY. The effect on my mind a while ago, when I picked this up, until I figured it out, was that 2¼ pounds was a good deal more than 1 pound, 14 ounces.

Dr. ALSBERG. After all; it is six ounces more, and six ounces is appreciable.

Mr. MCKINLEY. It is very deceptive.

Mr. MCLAUGHLIN of Michigan. To what extent have you had to enforce that ruling as to the method of marking weight? Have there been a number of arrests and prosecutions?

Dr. ALSBERG. I don't recall any arrests and prosecutions. The bulk of the manufacturers have conformed to the regulations. As a matter of fact, we have had to make a very small number of prosecutions under this requirement. We have been very slow in prosecuting anybody. In the beginning, of course, thousands of manufacturers did not understand or did not know. What we did in most cases, literally thousands of them, was to notify them what was necessary, and they said they would have their new labels printed in that way and they did so and no prosecutions were made. There have been no prosecutions except in the cases where the weight has been wrongly stated. Where we find a man whose label reads a pound and whose package runs consistently under a pound we have prosecuted, but until recently merely for failure to state the weight or to state it in compliance with the regulations we have made almost no prosecutions. I wouldn't say that there were no prosecutions, however, because sometimes we find an article that is adulterated, which we will prosecute on the ground of its being adul-

terated, and if it happens to be misbranded we include that charge also. We have had very few cases on the matter of branding, however. We have been giving them warning and calling the rules to their attention.

Mr. LANNEN. I would like to ask the doctor this question. You include the net-weight proposition so that you will have a dead open and shut case against a man—you can convict him on something. There is no escape for him when you get him on a short-weight proposition.

Dr. ALSBERG. I don't think we have ever made a case since I have been in the department that we didn't think was a sound, reliable case. We never make a case until we are convinced that the manufacturer deserves to be prosecuted.

Mr. LANNEN. I have had a number of cases where I have had to tell the manufacturer that he had no defense—couldn't defend himself—because his package was short weight, and you could get him on that, and he couldn't fight out the main issue on its merits, because if it had to go to a jury they would have to find him guilty on short weight at least. That situation has come up many times, where we couldn't fight out a good case on adulteration, simply because we were caught on the short-weight proposition.

Mr. WHEELOCK. Gentlemen, I would like to submit one package, which is the largest appearing 1-pound package put out by my company. This will illustrate the fact that the confectionery industry is somewhat peculiar in its relation to social fields and the gift proposition. This package is purposely made large and attractive because it is almost wholly a gift proposition. A man buys this as a gift for his hostess, or lady, and bearing in mind the social feature of candy eating, this package is made up with nine trays inside, which makes the package larger, but the purpose of the tray is to separate the contents conveniently for distribution to card tables, etc., so that there is a legitimate reason for the shape and size of that kind of package.

The CHAIRMAN. There is nothing there to deceive anyone, is there?

Mr. WHEELOCK. No, sir; that package has been on the market eight or nine years and its popularity has increased.

Mr. LANNEN. That is the kind of package we want to protect.

The CHAIRMAN. In your opinion, do you think the Department would discriminate against that or rule it out? Wouldn't it be safe to leave it to the department to determine whether that package could be used or not?

Mr. LANNEN. I will give you a demonstration of how the law works out. Here is a pound [indicating package of candy] and here [indicating a further package] is a pound.

The CHAIRMAN. Has either false bottoms?

Mr. LANNEN. No, sir; absolutely not.

Mr. MCKINLEY. Doesn't the size depend somewhat upon the character of the contents?

Mr. LANNEN. Yes; of course it does. As I said before, we have to go beyond the package which this law is aimed at exclusively and consider other things.

Mr. MCKINLEY. Is that pretty good candy?

Mr. WHEELOCK. The best we make. I hope the committee will sample it.

Mr. LANNEN. Mr. McDonald is the man who represents the firm who put out this package you had here yesterday. He came from Boston to tell you about it. In fact, he has been on trains for two nights. He went from Cleveland to Boston yesterday, and from Boston here to tell you about it.

The CHAIRMAN. Thank you, Mr. Wheelock. Now, Mr. McDonald.

STATEMENT OF MR. DONALD McDONALD, REPRESENTING PAGE & SHAW CO.

Gentlemen:-These false bottom packages have been discontinued by us, this particular package, since the 1st of October. The reason this package has been packed as recently as is indicated on the back is because we had a great number on hand at the time the National Confectionery Association requested that false bottoms be eliminated. We are not making any packages of this type now, with the false bottoms.

Mr. MCLAUGHLIN of Michigan. When did you begin to use boxes with false bottoms?

Mr. MCDONALD. We have been in business about 15 years. I sould say, at least, 12 years ago.

Mr. MCLAUGHLIN of Michigan. There is no reason arising out of the war that induced you to use them?

Mr. MCDONALD. No, sir; it was a matter of competition. It was the desire to make them an attractive looking proposition, the same as this flange makes an attractive proposition, by making it look larger. We did not want to do it, because it costs more money and the consumer gets the same value. They get the same value in that box as they do in a box without the false bottom that is three-eighths of an inch lower.

Mr. MCLAUGHLIN of Michigan. Did it ever occur to you that it might deceive the purchaser?

Mr. MCDONALD. That was not the intent. Deception was not the intent at all, because the purchaser asks for just such a box. It was a matter of competition. Some other manufacturer was giving them a larger box and they required a larger box from us.

The CHAIRMAN. Are we to understand that competition forced it upon the trade?

Mr. MCDONALD. Yes, sir; absolutely.

The CHAIRMAN. Then you have no objection to discontinuing the package?

Mr. MCDONALD. No, sir; we have discontinued it finally, and would like to see it discontinued by everybody.

Mr. MCLAUGHLIN of Michigan. When did you first know of a false bottom being used?

Mr. MCDONALD. About 9 or 10 years ago.

Mr. MCLAUGHLIN of Michigan. And you began its use as soon as anybody did?

Mr. MCDONALD. I think we did. As soon as there was a demand for it. It is the same way with the flanges. On our present boxes we have a flange that is hardly larger than a sixteenth of an inch, but still we have graded that down from a half inch to that size. The trade kept calling for larger boxes and we had to extend the

flanges to give them what they wanted. We do not make much of a specialty of candy in this form. At present we have only five boxes altogether, but they are all as compactly packed as possible. We have three types of boxes that are just plain and two with very small flanges. So far as we are concerned, we would like the elimination of all false bottoms and all other excesses in candy boxes.

STATEMENT OF MR. RICHARD H. BOND, REPRESENTING THE FLAVORING EXTRACT MANUFACTURERS OF THE UNITED STATES.

Mr. BOND. Gentlemen, I am chairman of the legislative committee of the Flavoring Extract Manufacturers' Association of the United States, and I am connected with McCormick & Co., of Baltimore. We are opposed to the bill in the form in which it is written. We are in favor of the bill with the recommendations for amendment as suggested by Mr. Lannen.

During the war, in the spice end of this business, due to the impossibility of securing canisters, the spice people used such containers as they had on hand or as they could get, and on those packages which did not require the net weight or count they did not put it on in many instances. That was not true of my own organization, but I am talking of the industry now. It was an impossibility to secure the proper size containers. It could not be done. It was a case of using what you had or could get or doing away with package goods. I am not going into a discussion of the value of package goods as against bulk goods. That is a deep proposition, and the best thought of the country, both as a business proposition, as well as from the standpoint of the housewives of the country, is that the package proposition is the way in which the ordinary food product should be marketed.

In view of the condition I have outlined, in some parts of the West, where the conditions were maybe worse than in the East, there were some very large size packages used that might have deceived the consumer when not marked. Incidentally, there was a demand, a trade demand, for 5 and 10 cent packages of spices. I do not know whether you gentlemen on this committee ever faced a trade proposition. I do not know what your profession is, or whether any of you ever faced a pay roll on Saturday night, but the situation is this: that it is a trade demand—and it is a very difficult thing to induce the housewife to give 6 or 7 cents for something. They want something for 5 cents or 10 cents in certain sections of the country. In other sections of the country they may demand a 15-cent package. The result of this was that in order to meet that demand, with the impossibility of securing the proper size cans in which to put it, by reason of the war—our own factory almost shut down and others over the country were in the same fix—that there was put on the market certain spices in larger cans than the contents in other times would have justified. It is my belief, and I am reasonably intimate with all the prominent spice grinders in this country, that they are an absolutely honest, straight, clean set of business men, and the trade itself would immediately damn a concern who was attempting to defraud either the merchant or the consumer, and the goods could not have been sold except under the conditions that faced us in war time.

We had a conference of the spice grinders, with the gentleman who is sitting here at my left. The occasion was a hearing on some action in the West, and I believed the department was convinced of the fact that in this particular thing, with regard to the spice packages, that it was brought about by conditions and not by fraudulent intent. I do not believe that since it has been possible to secure the proper size containers to fill these goods in there has been any cause for complaint in this direction. The Department of Agriculture following that, issued a ruling that the exemption for solids should be reduced from 2 ounces to half an ounce. You can not now put out a package of food containing more than ½ ounce unless it is marked. This leaves only an infinitesimal amount of goods which we are not compelled to mark on the package. So much for the spice end of it.

I was not here yesterday, and I just saw these bottles this morning as I came in, and I take it for granted this question of panel bottles for holding extracts was brought up. Dr. Alsberg, I take it that these are samples from your department. I take it that the production of these bottles here is an evidence of the intent of the department, or of the Bureau of Chemistry, to do away with the panel bottle. That is the reason they have got it here—to show you the supposed difference between the so-called sizes of these packages.

Now, the panel bottle for the packing of extracts has been in vogue almost exclusively since I was born. Among the first things I can remember is going to the little grocery store in the city in which I was born, Portsmouth, Va., to get something for the home and getting a bottle of lemon extract, and that bottle of lemon extract then was put up in a panel bottle. Extracts have been put up in the panel bottle practically exclusively, in the 10, 25, and 50 cent sizes ever since. They tell me that in some places in the West latterly they have tried to use a different-shaped bottle. It is now the department's idea, as this bill is drawn, to give it the power to say, "You shall not use this panel bottle for the packing of extracts." It has been the custom for generations to use this panel bottle, certainly through all my lifetime, and I am getting so old that I hate to think about it. You would revolutionize the business by doing away with the panel bottle. You would cause the loss of tens of thousands of dollars invested in the dies to make these bottles; you would cause the loss of hundreds of thousands of dollars invested in cartons and labels in which these panel bottles are inclosed. I do not believe there is any desire on the part of the housewife that this panel bottle should be discontinued. I would venture to say that there is not a housewife in this country who does her own cooking who does not know just how much cake or ice cream the contents of this panel bottle will flavor, and I will also venture to say that there is not a single one in this country that could judge how much this round bottle, which I take it the department is showing as the acme of perfection, will flavor. I am frank in saying that unless the content had been placed beneath the bottle I, who am in the business, would not have known how much it holds.

I say there is no need for that sort of thing, and it is against that sort of thing we want to protest. You would do no good by adopting the round bottle, except, possibly, to have a theoretical idea worked out. It is not my belief that this panel bottle is decep-

in any particular, and we are opposed to this bill as drawn. We manufacturers and business men are honest men, just as you Congressmen are honest men, and just as the Department of Agriculture is composed of honest people, and we are having entirely too much of this bureaucratic government to carry out this, that, and the other fad—far removed from good business usages. We oppose this bill for the reasons I have given, unless it is amended as suggested by Mr. Lannen.

Mr. LANNEN. Is there any extract manufacturer putting out bottles of this kind [indicating round bottle]?

Mr. BOND. None that I know of.

Mr. LANNEN. That was put up for this occasion?

Mr. BOND. I do not know.

Mr. LANNEN. I am referring to the round bottle.

Mr. BOND. That is what I am referring to. I want to say that a little while ago my concern thought they would get out a "Blake" bottle, a bottle a little different from this, but a flatter bottle, to try it out. It was a rank failure. The housewife did not want and would not take goods packed in that shape of bottle.

Mr. MCLAUGHLIN of Michigan. You mean a bottle without the concave?

Mr. BOND. Shaped somewhat like this. When you come down to what is at present the 15-cent size flavoring extract bottle, which contains six drams—that is, six teaspoonfuls—and you were to put it in a little round bottle, I would say you would have a hard time getting a label on it. There is no deception about the panel bottle. The housewife knows what she is getting, and that is what she wants.

Mr. MCKINLEY. Do you think by changing all the containers of extracts, peppers, and spices, etc., that it would tend to reduce the cost of living?

Mr. BOND. No, sir; I don't see it.

Mr. MCKINLEY. I mean this: If you made the manufacturer destroy all his labels and all his containers that he has been using for so many years, wouldn't he have to place the cost of that destruction upon the cost of the commodity?

Mr. BOND. You would have that much property destroyed and gone.

Mr. LEE of Georgia. Isn't it a fact that that round bottle could be made more cheaply than that flat one?

Mr. LANNEN. We have a bottle man here.

Mr. ANDERSON. May I ask you, if these four bottles were not labeled and were sitting on a shelf in a retail store, which, in your judgment, would be selected by the housewife, if they were all sold at the same price?

Mr. BOND. And not labeled? This one. [Indicates panel bottle.]

Mr. ANDERSON. And what is its content?

Mr. BOND. This particular one is a little short of the usual content. It contains an ounce and seven-eighths, or an eighth of an ounce less than 2 ounces.

The CHAIRMAN. Will you please explain that so the stenographer can correctly indicate the bottle you are referring to.

Mr. BOND. This panel bottle that they have here, marked "One and seven-eighths ounces"——

Mr. LANNEN (interposing). One and seven-eighths.

Mr. BOND. Marked "One and seven-eighth ounces" is a little short. That size and style bottle would ordinarily hold 2 ounces.

Mr. ANDERSON. You think there would be no deception?

Mr. BOND. There could be no deception. The housewife is used to getting it.

Mr. ANDERSON. There would be no inducement to the housewife to take the bottle which seemed to hold more if they were all exposed to sale?

Mr. BOND. It is not my judgment that it would seem to hold more. Looking at it personally, it would look to me as if this fellow over here [indicating round bottle] held more.

Mr. MCKINLEY. You mean the round bottle?

Mr. BOND. The round bottle. Very many of the flavoring extract manufacturers of the United States are also drug manufacturers. We are large drug manufacturers. All the wholesale druggists, nearly, make flavoring extracts, and they also put out their castor oil and other drugs in this kind of a bottle. The panel bottle is used by us as well for putting out drugs as for putting out extracts, and is used by all of us for the same reason, because it is trade custom and to obviate the necessity of carrying different kinds of bottles for different goods and carrying different stocks of different sizes and kinds of labels, cartons, and packers.

Mr. ANDERSON. Do you think it would be wise to standardize containers?

Mr. BOND. You might standardize contents.

Mr. ANDERSON. I mean containers.

Mr. BOND. I don't see any reason why that should be done. That wouldn't add anything to it. Suppose I took this bottle and filled it with a compound vanilla, or an imitation vanilla consisting of coumarin and vanalin, or either. It would cost me far less to do that than it would to fill that bottle with a pure extract of vanilla made from the vanilla bean, and, incidentally, in a pure vanilla, it would cost me very much less to make a pure vanilla out of a Tahati vanilla bean and fill that bottle than it would to make one out of a selected Mexican bean, and yet all of these are equally correct under the law. The department makes no distinction.

Mr. ANDERSON. Do they all have the same food value?

Mr. BOND. There is no food value; it is a flavoring.

Mr. ANDERSON. I mean as a flavoring.

Mr. BOND. No; the imitation has not.

Dr. ALSBERG. I would like to make it quite clear that the imitation has to be labeled "imitation," and the department does make a distinction. If a man puts out a coumarin solution as vanilla extract he will get in trouble, but he could put it out as an imitation vanilla, because that is contemplated by law. You were trying to make the point, Mr. Bond, that the cost of packing differed in all these different things and that the department made no distinction.

Mr. BOND. No; I didn't intend to do that.

Dr. ALSBERG. That was the impression I got. The fact is that it wouldn't be the same article. One would be an imitation.

The CHAIRMAN. It is so labeled.

Dr. ALSBERG. Yes; so labeled.

Mr. BOND. But to the consumer who saw the label on the bottle, the size of the package wouldn't make any difference; and then to take one made from a Tahati bean—that is a pure vanilla—the cost would be less than if it were made from a selected Mexican bean, and also it might be made from a different quality of either of these beans.

Mr. ANDERSON. There is another point—leave the consumer out of it. There is a suggestion that as between the various dealers there is an unfair advantage in favor of the man who has that large bottle, large-looking bottle.

Mr. BOND. We all use it.

Mr. ANDERSON. Somebody evidently made the small bottle on the end.

Mr. BOND. We don't know that he filled it with flavoring extract.

Mr. ANDERSON. Suppose he had. Suppose there are bottles of that kind on the market, filled with extract, leaving the consumer out of it, is there such an unfair advantage to be enjoyed by the man who puts out the big-looking battle over the other fellow, so that the Government ought to step in and pass some law for his protection, or your protection, as against the other dealers?

Mr. BOND. No.

Mr. LANNEN. I will ask you, Mr. Bond, if it isn't a fact that the Flavoring Extract Manufacturers' Association of the United States has for the past two or three years been considering the advisability and the possibility of standardizing flavoring extract bottles?

Mr. BOND. Yes.

Mr. LANNEN. And they have a committee appointed on that now, haven't they?

Mr. BOND. Yes.

Mr. LANNEN. Working on that problem?

Mr. BOND. Yes.

Mr. MCLAUGHLIN of Michigan. And is that round bottle a kind that is quite generally used in the trade?

Mr. BOND. It is not used at all.

Dr. ALSBERG. There are a few manufacturers who are using a different shaped bottle, but the percentage of the product packed in the bottles of the smaller type is very small. But there are a few.

Mr. MCLAUGHLIN of Michigan. Was that bought by some of your force from the trade?

Dr. ALSBERG. That was not bought with flavoring extract in it. It was simply bought to show the difference in the bottles.

Mr. BOND. I take it for granted that is not flavoring extract in the bottles now.

Dr. ALSBERG. No.

The CHAIRMAN. Thank you, Mr. Bond. We will hear Mr. Jenkins next.

STATEMENT OF MR. HARRY JENKINS, REPRESENTING THE GLASS BOTTLE BLOWERS' ASSOCIATION OF PHILADELPHIA, PA.

Mr. JENKINS. Gentlemen, I am the national secretary of the Glass Bottle Blowers' Association. I occupy the position, Mr. Chairman, being both with the fellow who puts up that bottle and the fellow buys the contents.

I have never seen a flavoring extract put up in anything else but a panel bottle. Dr. Alsberg made some statements yesterday that I do not agree with, and I must say he is unconsciously driving toward something I will bring out later on. This bottle was before us yesterday [indicates foreign liquor bottle], and I wondered to myself at these few extreme types being brought forward. This is a bottle made in either Italy, France, or Germany, and they are all made with that high push up, and the doctor is a little off on his mathematics. If this is a "five," it holds 25⅗ ounces and not 32 ounces. They were never intended to be "quarts." We knew them as "quarts" some years ago before the department insisted on saying that 32 ounces was a quart and 16 ounces was a pint. It seems strange that out of the millions of bottles made these two extreme types should be brought here. These [indicating pickled onion bottle], I do not believe there are many of these made. I have seen them in the stores, but it is made on a hand machine. This bottle [indicating liqueur bottle] is made by hand principally. No machine enters into it. It is a drawn-mold bottle, and the man puts the stamp on afterwards. That type of bottle has not been made in this country for years. There are none of this kind made now, and they haven't been for 15 or 20 years.

The point I want to make, Mr. Chairman, is this: This is a machine-made bottle. Up until 1904, practically all the bottles were made by hand. At that time machines came in, and I must disagree with the doctor when he says the machine bottle is the cheaper. It may be cheaper in one sense of the word. It is cheaper to the fellow who operates the machines. He is the fellow that gets the advantage, because he has a machine that can turn out great quantities of bottles at a great deal less cost than a man who operates by hand. But there is a sinister movement there to keep the price down so that a fellow can just struggle along that makes ware by hand. That man is eventually going to be driven out of business, or else the wages of the man who makes the bottles is going to be reduced in order to let this man stay in the business, and I want to say, here and now, that in 1909 we reduced our wages voluntarily 20 per cent to stay in the business against these machines, and in 1919, we reduced another 20 per cent, and "brandies," "whiskies," "wines," "beers," "sodas," "catsups," and the likes of that, all great big orders, have gone to the machines, except in a few isolated cases. There are few made by hand to-day. This [indicating bottle] is made by a hand machine, and this [indicating another bottle] is evidently made by automatic machinery. The point I want to make is this: That the machine people will keep these prices just so that that fellow who makes them by hand can struggle along and eventually he will go out of business. After that, when they get absolute control of the bottle business, the prices will go to where they choose to put them, and you will pay those prices to get your bottles. That is the unwritten law.

Now, I have never seen extract put up in round bottles in my life, and it is true, what Dr. Alsberg said that the panel bottle isn't so readily made on machines. They have made them on machines, but not in marketable quantities. It is therefore in the hand factory that these panel bottles are [illegible] and [illegible] largely look to the [illegible] with prices [illegible]

Mr. McKINLEY. You mean, then, of these four bottles, the panel bottles are not made by automatic machinery, but by hand, and that this bottle is made by machinery?

Mr. JENKINS. I wouldn't say it is made by machinery, but it can be made by machinery. [Examines bottles in question.] Yes, both these bottles are made by machinery. That second bottle is made by the biggest corporation making bottles in this country to-day.

Mr. McKINLEY. And these [indicating] are made by hand.

Mr. JENKINS. Yes, sir. Unconsciously, I think the doctor has been drawn into this against his wisdom. I have been before him before and have always found him a square man. We feel that the discrimination in this regulation, as submitted by this committee, is going to drive that panel bottle out of business. That affects the man who blows the bottles. It goes to these round bottles that the machines can make. Now, when you understand that the Seventeenth Amendment, going into effect after next January, will take 4,500,000 gross of bottles out of the business.

Mr. LEE. You mean annually?

Mr. JENKINS. Annually. That means that these machines making that ware will make no more of it. There will be no market for beer and brandy bottles, and they are going to go out in the market and take other orders, and, after all, that is a restricted trade. It is more of a luxury than anything else. People can put their product up in tin cans or paper and not use bottles so much, and if, after a while, our business gets to such extent that we can not make any more beer and whiskey bottles, it is natural to assume that they are going to grab everything they can get. The prices will be reduced, the consumer and dealer will get some of the benefit, but not much, and after they get aboslute control, the prices will go up and you will have to pay them.

Now, this bottle [indicating] is a three-quarter ounce panel, known as an "Argyle" panel. It is used largely in the extract trade. This [indicating small, brown bottle] is used largely for pills. It contains a certain number of pills. They are all panel bottles.

Mr. McKINLEY. Are these all hand made?

Mr. JENKINS. All hand made. This bottle [indicating large perfume bottle] no doubt could be considered deceptive by the department because of the concave in the side. Here is a two-ounce bottle for preserves, to be used on the table. It would discriminate against all these bottles. Here is an extract bottle. These panels are usually put in there to protect the letters or the paper label. I believe Mr. Bond can verify this statement. These are all made by hand, every one of them. Here is a perfume bottle. That has a depression in the side. It will discriminate against that.

Mr. McKINLEY. Do you think these bottles are deceptive to the housewife? Now, the taller of these bottles is a three-quarter ounce bottle and the other bottle is an ounce bottle. Do you think, to the eye of the purchaser coming into the store, they would buy the taller, longer bottle?

Mr. JENKINS. I do not think it would be any more deceptive in that particular case than you would be deceived in buying something you know nothing about. If you buy a suit of clothes to-day, you can't tell whether you are getting wool or cotton, and half the shoes

you buy don't contain very much leather, and we don't know anything about them when we buy them. I can not remember the time when there wasn't a panel bottle in the trade. There always were panel bottles, and always will be, no doubt.

Mr. YOUNG of Texas. Is any food ever put in a bottle of that kind [indicating concaved perfume bottle]?

Mr. JENKINS. No, sir; that is a perfume bottle. I brought that along to show it would be discriminated against.

Mr. YOUNG. In what way?

Mr. JENKINS. Because of that depression. I want to say right here and now that we are in favor of anything that removes deception from the people. We are one of the people who have to buy. We want that removed, but we do not want discrimination so that we can not sell what we make.

Mr. YOUNG. I think the amendment simply deals with articles of food put in bottles and doesn't touch perfumes and drugs.

Dr. ALSBERG. We have no jurisdiction over perfumes.

Mr. JENKINS. I just brought that along as an illustration.

The CHAIRMAN. How much does this hold?

Mr. MCLAUGHLIN. Seven and a half ounces.

Mr. JENKINS. Now, Mr. Chairman, about a year and a half ago the Interanl Revenue Department confiscated I don't know how many carloads of ware right here in the District. They were made for liquor and were supposed to hold 32 ounces of liquor, but in the graduation of them they only held 31½. They were made by a company that operates machines and they were made by machines. Everybody can not get these machines. There are only two companies with these machines in this country. They are licensed and a royalty is paid to the inventor and I suppose he has other interests in them. The Internal Revenue Department confiscated that ware. We asked them who made it, and they said they wouldn't tell us, and they changed their tolerances down at the Treasury Department, and it took us two or three days to convince these people that in place of going at it right and catching the fellow who wanted these bottles that way, they went back on the consumer. It would be just as easy to catch the man who ordered these bottles made short as to change the regulations. It doesn't make any difference to the manufacturer of a bottle whether you want that bottle made one ounce, or half an ounce, or three-quarters of an ounce short. All you have to do is send your order in. If the manufacturer of flavoring extracts wants that bottle made in a half ounce, in that size, it is up to the manufacturer of bottles to make it the way he wants it. It won't cost a cent more. It is the man who puts the stuff in the bottle that attempts the fraud. That is the way it was with this whisky concern that had these bottles confiscated.

Mr. WILSON. As I gather, your argument is on the point that you are making hand-made bottles and if the department ruled these bottles out, you would be put out of business. Is that what your argument is?

Mr. JENKINS. There are some of these bottles made by hand.

Mr. WILSON. I mean that is your argument.

Mr. JENKINS. It looks to me like Dr. Alsberg has been unconsciously—he mentioned two or three times yesterday that it was made

by machine and that these were made by hand. A machine can do certain work. It has no thinking apparatus. It goes on in a mechanical way and does as it is supposed to do as a machine. Whereas if a man was on the end of a pipe blowing that bottle, he would know how to manipulate it to get the best results. What we are afraid of is that that resolution will give us the wrong end of it.

Mr. HORIGAN. I was wondering whether the machines couldn't make a bottle that would bulge outward instead of inward and have an attractive feature, and which would give the consumer about what he thought he was getting in the way of contents of food.

Mr. JENKINS. I might say that they had an order for this "3-in-One" oil, made in Newark, N. J. That man is somewhat of a "bug" on machinery, and he has a filling apparatus of his own invention, and he has a dozen, or two dozen bottles, that would stand side by side and these arms came down and filled them all at one time. He had some of these machine-made bottles and they were slightly bulged, and after they got past the first three or four the filling apparatus didn't touch there. With the bulging on the side it would have a tendency to hold more.

Mr. MCKINLEY. That bottle [indicating] bulges on the side. It is the same kind of a bottle as this [indicating] except that it bulges out.

Mr. JENKINS. There is a panel.

Mr. MCKINLEY. It is a panel bottle and it bulges out, and here is a panel bottle that doesn't.

Mr. JENKINS. That is a standard bottle that has been in existence for years.

Mr. ALSBERG. Look at the disposition of the glass in these bottles. It bulges in on the outside and is very full.

Mr. JENKINS. These bottles are filled on an iron table and it is necessary to have that a little thicker there, because if it breaks it not only spoils itself but all the others.

The CHAIRMAN. Thank you, Mr. Jenkins. Dr. May desires to say a few more words.

Dr. MAY. You will find that every bottle we have on the market in the extract business, that none of them are ever sold in this form. They are all put up in cartons. You have to buy a carton for this bottle, allow for the cork, and you will find that the package is absolutely larger looking with the round, 2-ounce bottle than with the flat, narrow, panel bottle. Put this in a carton and allow for the cork and you will find my contention pretty nearly correct.

Mr. MCLAUGHLIN. You mean that a large number of the bottles are shipped in a carton?

Dr. MAY. Individually.

Mr. MCKINLEY. All these battles are in individual cartons.

Dr. MAY. You must allow, in the carton, for the corners; that would give you about a quarter of an inch on each corner. These are packed pretty compactly so that we can ship without breakage. Furthermore, if you have the panel extended like this, my experience has been that it will weaken the shoulder of the bottle. You would have a greater amount of breakage, and from the point of view of economy in shipping space, everything would be against this round bottle.

Dr. ALSBERG. How about this bottle? This is one I have from manufacturers not using a panel bottle.

Dr. MAY. That is a matter of practice. It is a prescription bottle and never sold to the housewife.

Mr. MCLAUGHLIN of Michigan. Don't you have to exercise considerable care to see that the two sides of that bottle don't meet? [Laughter.]

Mr. HORIGAN. Isn't it true that when that goes to the shelf of the retailer, that sample bottles are taken out of the carton, and for the purpose of buying the housewife goes into the grocery store and sees the bottle on the shelf of the retail dealer, where the bottle is exposed?

Dr. MAY. My personal experience is to the contrary. I don't think, if you should go into a grocery store and ask for a bottle of extract, that they would take the bottle out of the carton.

Mr. HORIGAN. Haven't you seen bottles exposed on shelves or in the showcase?

Dr. MAY. That may be where a carton has been soiled, flyspecked, or a bottle broken in transit, where they would remove the bottle. That is my experience.

Mr. HORIGAN. Isn't it true that there is a picture on the carton of the bottles, to give a general idea?

Dr. MAY. There is only one in my experience. There is just one customer that we have, and we ship flavoring extracts from coast to coast, who has a reproduction of the bottle.

Mr. HORIGAN. Isn't it true you have it in your advertising?

Dr. MAY. No; there is only one manufacturer who shows the bottle.

Mr. LANNEN. If it was true, the picture would be very much smaller than the bottle and the carton itself.

Dr. MAY. Yes, sir. I have had experience with the round bottle, and I know if I was packing this round bottle, I would get an extra large cork and allow enough room, and you would have to have besides this bottom a false layer.

Mr. YOUNG. I would like to ask this gentleman why it is necessary to pack round bottles in square cartons.

Dr. MAY. As a matter of protection. You will find this bottle has no protection on the shoulder or side of the bottle.

Mr. YOUNG. Why couldn't it be packed in a round carton?

Dr. MAY. Impossible to make. It would be all handwork. You would have to get your corrugated paper and that would have to be wrapped in another wrapper. You would have to put a false bottom and another layer here to get a uniform package. These are all put in the cartons by machinery mostly.

Mr. LANNEN. Before the committee breaks up: The ——— Co. have advertised that package and they have a great many competitors. Dr. Alsberg has practically damned that package in the records before this committee, and I ask that either that part of the record be stricken out or that the committee pass judgment on that package.

Dr. ALSBERG. I have no objection to its being stricken out.

Mr. MCLAUGHLIN of Michigan. I would suggest that Dr. Alsberg look over the testimony and, in view of what you say, if he is willing

to have any modification made, he can do so, and the committee will not object.

The CHAIRMAN. It will all be taken into consideration.

Dr. ALSBERG. I have no objection to its being stricken from the record, but I would like to call Mr. Lannen's attention to the fact that the package was not here yesterday and I never mentioned the firm name in anything I said.

Mr. MCLAUGHLIN of Michigan. Is this product advertised as maple sirup?

Mr. LANNEN. No, sir; just as it is labeled.

The CHAIRMAN. We will now hear Mr. Bode.

STATEMENT OF MR. FERD. W. BODE, REPRESENTING THE NATIONAL BISCUIT CO.

Mr. BODE. You have before you an exhibit of the package produced by the National Biscuit Co. It is in the form of a barrel and is used for the sale of ginger snaps. Now, as to the origin of this package: This package is probably used from the fact that since bakeries have been operated in a commercial way and on a large scale, the farmer in the country had a barrel of ginger snaps and a barrel of apples on hand all the time for his children to eat, and ginger snaps have been packed in barrels, and there is a desire in the trade for a barrel of ginger snaps. Now, ginger snaps in a large barrel get soggy and unfit for food, and to meet that situation the National Biscuit Co. produced this small carton of ginger snaps, which can be purchased by the consumer at a moderate cost, and in fact they can get more ginger snaps in this barrel than they could if they bought them in bulk for the same money, and the ginger snaps stay in a good, saleable condition until they are used.

There is nothing deceptive about that package. It is made in the form of a barrel and everybody knows, the housewife and everybody else, that a barrel has a head set in at the top and at the bottom. The package is filled full, but there is bound to be more or less shaking up of the goods in there and as they are shaken up they will shake down a little bit, and a reasonable tolerance would, of course, take care of that, and I maintain there is nothing deceptive about the package. The fact that the heads are set in is the only thing that possibly could be considered deceptive and that shows plainly on its face, and the package is in the form of a barrel and everybody knows that a barrel has the head set in. Consequently, I do not see where there could be any deception in that package, and I should like to go on record and have this package distinguished from some of the packages that have been produced here that are slack-filled and are deceptive to the consumer.

Mr. MCLAUGHLIN of Michigan. How nearly filled is this package when it leaves your place?

Mr. BODE. It is filled full. That is one purchased this morning, and it shakes very slightly. That was purchased in a grocery store this morning. There is another point I may mention. The contents may break, and as the ginger snaps break in pieces they will naturally take up less room and there is bound to be more or less breakage in the handling of that package from the factory to the

distributing agency and into the grocery store, and therefore the package will not be entirely filled when it reaches the consumer, but it will be entirely filled when it leaves the factory.

Mr. BOND. Might I take up a minute?

Mr. MCLAUGHLIN of Michigan. Does your company have anything to do with any of these other packages: paste-board packages?

Mr. BODE. We do not make Saratoga chips. All the packages we put out are filled to capacity when they leave the factory, but the contents being of a fluffy nature there is bound to be more or less breakage when the packages are handled in their course from the factory to the consumer. This breakage will cause the contents to sink together more or less and the package will not be entirely full when it reaches the consumer.

Mr. BOND. He has practically covered the point.

The CHAIRMAN. In this instance there seems to be very little deception, if any.

Mr. BODE. I can not see where there is any deception at all in that package, because it is in the form of a barrel, and everybody knows the heads have to be set in.

The CHAIRMAN. Wouldn't it be safe to leave the determination of that to the department?

Mr. BODE. I want it understood that I am not opposed to this law, and the National Biscuit Co. is not opposed to it, but we do not want to be classified as having put up a slack-filled or deceptive package when the package is not deceptive.

The CHAIRMAN. Is there anything in the testimony to show that your package is so charged?

Mr. BODE. There is nothing, except for the exhibit right there in front of you. It is marked as being a deceptive package, and for that reason this full package was produced here and I am making this statement.

The CHAIRMAN. What you object to is having that go into the record?

Mr. BODE. I object to having that package before the committee as a deceptive package.

The CHAIRMAN. Would you object to it if the names were eliminated?

Mr. BODE. I think I would, because I do not think the package is deceptive. You must take the fact, rather than the name. The name of the manufacturer has nothing to do with it. I think probably everybody would know that the National Biscuit Co. was involved, if you stated a biscuit manufacturer put out a ginger snap in a barrel package.

The CHAIRMAN. The package is well filled, and not like many of the other exhibits.

Mr. BODE. If you say it is gingersnaps, everybody would know.

The CHAIRMAN. Are they the only manufacturers?

Mr. BODE. Not the only manufacturers, but I believe we are the only manufacturers that put out a barrel of gingersnaps.

The CHAIRMAN. I assure you your statement and explanation will be taken into consideration. If you desire, I see no objection to removing the package from the exhibit. Thank you, Mr. Bode. We will hear Mr. La Dow next.

STATEMENT OF MR. ORVILLE D. LA DOW, NEW YORK CITY, N. Y.

Mr. LA DOW. I have but one word to say. It seems to me that this whole thing resolves itself into three parts: First, the good intent of the manufacturers; second, phraseology of the proposed act; and, third, the continuance of the sanity that now rules in the Chemical Bureau and Department of Agriculture.

I want to say just one word on behalf of the Calumet Baking Powder Co., of Chicago, in explanation of the statement made yesterday by Mr. Newman, in which he referred to automatic machinery, because my explanation may help you to so adjust the language of the bill so as to protect the interests of the commercial producers.

The CHAIRMAN. That is the object of the bill, absolutely. That is what we want to do.

Mr. LA DOW. Baking powder consists of three classes; some is more granular than others. All baking-powder companies—large companies, of course—use automatic machinery in filling their cans. Every can is filled just as full as it can possibly hold, by machinery; but in the case of baking powder of a granular character, it will, of course, occupy more bulk when in a light and fluffy condition, because, on account of the granulations, there are larger voids between the particles than in baking powders of a different class. Now, then; that, of course, relates to and affects the bulk of the powder. We put just as much powder into our cans as possible. In the shipment, however, of that can of baking powder from Chicago to Texas it is shaken down, so that when it gets to Texas it doesn't appear to have as much powder in it as before, and yet not one particle has been removed, and there is just as large a quantity when it reaches Texas as when it was originally filled, only it has been packed down by reason of transit conditions; and I would like to have that feature considered when you finally draft the bill.

The CHAIRMAN. Have you any suggestion as to how to overcome that?

Mr. LA DOW. It is my opinion that Mr. Lannen's suggestion, bringing into issue the good intent of the manufacturer, is all that is necessary. We are with you, body and soul, in the purpose of this bill—to prevent fraud. We are down on every type of deception. That is all I have to say.

Mr. HORIGAN. Mr. Chairman. I understood you to say that we would have the department's permission to present the legal views of the department with regard to the element of intent introduced by Mr. Lannen's amendment. I anticipated yesterday that Mr. Lannen would introduce that, and I took it up with the solicitor and he was of the opinion that it would practically nullify the law, and he asked me to submit these views to the committee—his opinion on specific intent.

The CHAIRMAN. What would be a satisfactory time to discuss the matter before the committee?

Mr. LANNEN. Mr. Chairman. I am busy to-morrow. I will be here until Thursday.

The CHAIRMAN. Would it be convenient to meet this afternoon?

Mr. LANNEN. I would have to fall back on what is in my head. I haven't given the subject any study.

The [illegible]

Mr. [illegible]

The [illegible]

Mr. [illegible]

The [illegible]

Mr. [illegible]

The [illegible]

Mr. [illegible]

Mr. [illegible]

The [illegible]

Mr. [illegible]

Mr. [illegible]

The [illegible]

(Whereupon, at 11.30 o'clock a. m., the committee adjourned, to reconvene at 10 o'clock a. m. Thursday morning, October 30, 1919.)

AMENDMENTS TO THE PURE FOOD AND DRUGS ACT

HEARINGS

BEFORE THE

COMMITTEE ON AGRICULTURE

HOUSE OF REPRESENTATIVES

SIXTY-SIXTH CONGRESS

FIRST SESSION

ON

H. R. 8954

OCTOBER 30, 1919

PART 2

WASHINGTON
GOVERNMENT PRINTING OFFICE
1919

COMMITTEE ON AGRICULTURE.

HOUSE OF REPRESENTATIVES.

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AMENDMENTS TO THE PURE FOOD AND DRUGS ACT.

COMMITTEE ON AGRICULTURE,
HOUSE OF REPRESENTATIVES,
Thursday, October 30, 1919.

The committee met at 10.15 o'clock a. m., Hon. Gilbert N. Haugen (chairman) presiding.

The CHAIRMAN. The committee will come to order. Hearings on H. R. 8954 will be continued. Under the arrangements made Tuesday consideration will be given to certain amendments that have been suggested.

From the hearings so far it would appear that the bill under consideration would be acceptable to all who have been heard if amended in certain particulars.

In looking over the memorandum submitted in behalf of the National Grocers' Association of the United States I find the following conclusion:

> In conclusion it is respectfully submitted that H. R. 8954 be amended in the following particulars:
>
> First. By striking out the word "may" on page 2, line 9, of the bill, and substituting therefor the word "shall."
>
> Second. By inserting in the bill a provision allowing reasonable time for the disposal of goods on hand which do not comply with the provisions of paragraph "fourth," section 8.
>
> Third. By inserting on page 2, line 7, after the word "filled" the words "so far as is consistent with good commercial practice."

This is signed by the National Wholesale Grocers' Association of the United States, Arjay Davies, president; Alfred R. Beckmann, secretary; Fred R. Drake, chairman pure food and legislation committee; Breed, Abbott & Morgan, counsel. It is dated October 27, 1919.

I suggest that anyone present wishing to oppose them be heard first. After that, or, if there is no one who wishes to be heard on the three amendments, the committee will hear those who desire to discuss the two amendments suggested by Mr. Lannen, which he will have an opportunity to submit later.

From the hearings so far it would appear that the only form of opposition offered are the amendments referred to. We have representatives of the Department of Agriculture present. Mr. Williams or Dr. Alsberg, do you care to be heard upon these amendments? Have you any objection to the amendments suggested?

Mr. WILLIAMS. I would like to say a few words.

Mr. ANDERSON. I would like to ask Mr. Williams a question upon the amendment upon page 3 of the bill before we start. That is the amendment which relates to the form of the package. It strikes me that the trouble with that provision is that it does not lay down any fixed rule, but requests an opinion as to whether or not the package

is so formed or shaped as to deceive the public. In the case of the slack-filled package that is capable of ocular demonstration or measurement. The question whether a package is so formed or shaped as to deceive the public is a question of opinion, and it strikes me that unless you can lay down some definite rule by which the question is to be determined that this proposition is pretty broad for a criminal statute.

STATEMENT OF MR. WILLIAM M. WILLIAMS, SOLICITOR, DEPARTMENT OF AGRICULTURE.

Mr. WILLIAMS. In a way it is a criminal statute, Mr. Anderson, but it is more of a corrective measure. I do not believe you could lay down any rule pursuant to which you could definitely determine whether or not it is deceptive, because the word "deceive" has its own meaning. The question would be whether or not the package deceives. That fact must be gathered from all the circumstances. I do not believe you could write into the law a definite measure by which the deception could be determined, because, as I have just stated, the word "deceive" has its own meaning. The question has been considered as to whether or not to meet that objection you might write in intent, but I do not believe that it would be practicable from an enforcible standpoint.

In order for this amendment to be a full measure and to give to the consumer full protection he should be protected against negligence of the manufacturer and mistakes on the part of the manufacturer, as well as from intentional misconduct. I could not find any plan that I thought was practicable pursuant to which we could name a measure for determining the deceit, but, as I have said, we did consider the question of intent.

That may answer your question so far as concerns the practicability of laying down a measure for deceit, and if you desire to hear me further I will go on to the question of intent, because I believe that is one of the troubles.

The CHAIRMAN. Do you care to make any comment on the amendments suggested? For instance, striking out the word "may" and inserting in lieu thereof the word "shall," on page 2, line 9.

Mr. WILLIAMS. That is with reference to striking out the word "may" as it appears in that part of the amendment relating to tolerances?

The CHAIRMAN. Yes.

Mr. WILLIAMS. I do not see much objection to changing the word "may" to "shall." We have put in the word "may" instead of the word "shall" because the department thought there would be some products that would not require tolerances. If the word "shall" is put in there, it would contemplate that we would have to establish tolerances and that tolerances would be needed. Substituting the word "may" is a practical measure.

Mr. MCLAUGHLIN of Michigan. If the word "shall" was there, would it mean in the first instance, at once, for the department to establish a tolerance in each case as to each product and practically as to each container?

Mr. WILLIAMS. I think possibly if the word "shall" is used we might give it an interpretation of may in certain circumstances. You

gentlemen know that the word "shall" is sometimes the same as the word "may."

Mr. McLAUGHLIN of Michigan. If the word was deliberately changed from "may" to "shall," so as to give it that meaning?

Mr. WILLIAMS. Yes, sir; if we considered the legislative hisorty of the act, which we would have to consider, we would probably be confined to an absolute direction to establish the tolerance, and there may be cases where no tolerance would be desired.

Mr. JACOWAY. It has been some time since I looked that up, but I want to ask you in the judicial ascertainment of the meaning of words have not the courts, as a rule, construed that the word "may" and the word "shall" are synonymous and both practically mean the same thing in all statutes?

Mr. WILLIAMS. My recollection of the word is that in arriving at its meaning the courts usually consider the entire statute. Sometimes they hold that it is simply directory; at other times they hold that it is mandatory, the whole question depending upon the context. Now, as has just been suggested, in construing this statute, if it were shown to the court that this amendment as originally presented carried the word "may," and that after discussion it was stricken out and the word "shall" substituted, I have no doubt that the court would find that the word "shall" if it is put in, would mean an absolutely mandatory order and it could not be given the meaning of the word "may."

Mr. JACOWAY. Is it the understanding that the word "shall" carries with it a command to do a certain thing and the word "may" carries with it an option?

Mr. WILLIAMS. I believe that if the word "shall" were put in here now it would be construed as a command.

Mr. JACOWAY. I have a different idea of it. I looked it up, and as I recall, my investigation was to this effect, that the two words were interchangeable and synonymous, and practically, in the construction of statutes, meant the same thing. In that I may be in error.

Mr. WILLIAMS. That was probably with reference to a particular statute that the court had under consideration. As I have said, they sometimes give it one meaning and then another. Depending upon the context and the history of the act, they sometimes give it an absolute meaning of command.

Mr. JACOWAY. That is, the word "may."

Mr. WILLIAMS. The word "may" or the word "shall."

Mr. ANDERSON. I understand that the courts ordinarily construed them as directory.

Mr. WILLIAMS. That is true.

Mr. ANDERSON. And it is directory, and more or less mandatory, unless it is used with qualifying words, such as "in his discretion."

Mr. WILLIAMS. That might be done. I think if you will go through the decisions you will find it hard to determine a clear rule for a definition of "may" and "shall." It is a question of statutory construction, and you know that courts sometimes take different views depending upon how they feel when it is presented to them.

Mr. PURNELL. If this amendment is adopted, there will be no room for discussion as to what the intention is?

Mr. WILLIAMS. If the amendment is adopted in the present circumstances, I believe we would he held under the mandatory order.

Mr. PURNELL. Absolutely, because that is clearly the intention of the word, to make it as mandatory as it is possible to make it.

Mr. CANDLER. The courts have attempted to carry out the intention of the legislative body Whenever it is demonstrated that the intention of the legislative body is mandatory, they will enforce that, and hence the suggestion that if after discussion the legislative body would strike out the word "may" and insert "shall," the plain intention is that it was mandatory and the court would so enforce it.

Mr. JACOWAY. If you were going to construe what the intention of Congress was, would you come back to these hearings and take into consideration this discussion?

Mr. WILLIAMS. Yes, sir.

Mr. CANDLER. The courts frequently refer to discussions on the floor of Congress.

Mr. WILLIAMS. And they are doing that more and more every day. They are going back to the legislative history of the acts as they appear in the journals of the State legislatures and as they appear in your records, in construing statutes.

Mr. JACOWAY. Formerly, when you construed a statute, you just construed that from the statute itself; that was the hidebound rule?

Mr. WILLIAMS. That came about from the fact that you did not have good records in the old days, but with the growth of the stenographic art you get it all, a complete history, and that is considered.

The CHAIRMAN. Can you approximate the time required to establish these tolerances?

Mr. WILLIAMS. Dr. Alsberg could inform you more definitely with reference to that.

Dr. ALSBERG. How long it would take to establish tolerances?

The CHAIRMAN. Yes.

Dr. ALSBERG. It would take quite a long time to cover all things. We have been at work on the subject for about three years in connection with the Gould amendment. We have not published any tolerances. We have established for ourselves in the enforcement of the Gould amendment as a guide certain tolerances, but have not published them because we do not want to give the manufacturer a formula to shave closer to the line than he otherwise might dare to do. It is a matter of several years, but I do not think that would interfere with the enforcement of the act because the bulk of the violations with which we would have to deal would be so patently beyond the pale of any tolerance that I should not think our failure to announce a specific tolerance would interfere with the enforcement of the act in flagrant cases. It would probably be several years before we would be able to deal with the border line cases, but flagrant cases could be handled promptly; we have enough information at the present moment to handle them.

Mr. MCLAUGHLIN of Michigan. I have not a copy of the bill before me now, but I would like to ask, if the word "shall" is put in there in place of the word "may," might it not require you, before you started to enforce the law at all, to publish and let it be clearly known to the trade just what the tolerance in each trade is?

Mr. WILLIAMS. That is what I had in mind.

Dr. ALSBERG. If that is the case, it would take a long time.

Mr. MCLAUGHLIN of Michigan. Your regulations as to tolerance would become a part of the law, and the manufacturer would have a right to know just what the tolerance is at the same time he learns the other parts of the law.

Dr. ALSBERG. If that is the interpretation of the law, then, of course, it will take us some time to cover the whole field.

Mr. PURNELL. And in the absence of a published tolerance it would constitute an offense.

Dr. ALSBERG. If that is the way the law would work.

Mr. PURNELL. That is a serious thing about the whole proposition, that if you have not the machinery to publish these tolerances within a reasonable length of time, every concern for whom tolerances have not been published, touching his business might have created for him under this very act a defense.

Dr. ALSBERG. If that is the interpretation of the law, we will go ahead and get the tolerances in shape in less time. It would simply mean that we would have to readjust our operations. If that is the interpretation of the law, we would take a lot of our force off of other work.

The CHAIRMAN. How much time would be required?

Dr. ALSBERG. If we found it necessary to detail all the men needed to do it, while I can not say when we would get through every conceivable type of package, I think we could probably cover the important types of packages in a year or so.

The CHAIRMAN. Can you state it more definitely than that. Could you do it in a year?

Dr. ALSBERG. We could cover the main types, ordinary bottles, cartons, and cans, in about a year, taking advantage of the three years' work that we have already done. There would be special types of packages which we could not cover, and, of course, there will be new types of packages coming in all the time for which tolerances will have to be established. The main articles, however, we would cover in a year.

Mr. WILLIAMS. Suppose the word "shall" were written into the law and the Bureau of Chemistry attempted to establish tolerances, and suppose that the Bureau of Chemistry in the exercise of due diligence did not establish a tolerance for a particular article. If the manufacturer of that particular article were haled into court, he could make a strong defense on the theory that the law required a tolerance to be established for him, that the Bureau of Chemistry had never done so, that the law was still in an imperfect condition, not having been supplemented by a tolerance for his particular product, and therefore he should be acquitted.

The CHAIRMAN. In order then to properly and successfully enforce the law, it would be necessary to establish tolerances?

Mr. WILLIAMS. I am afraid so. It is a debatable question but I feel that in passing legislation we should be careful not to leave loopholes. The honest man is going to be all right; it is only for the dishonest.

Mr. PURNELL. Following that a little further, it necessarily follows that the dishonest man will be the very first man to take advantage of this situation and weakness of the law.

Mr. WILLIAMS. Precisely.

The CHAIRMAN. After all, if the amendment is made, we will allow ample time to dispose of stock on hand before the penalties go into effect. That would give time to establish tolerances. Can you state definitely what time would be required?

Dr. ALSBERG. That is very difficult to do. There are new packages, new types, and new packing machines and new methods of putting things up developed all the time. We will never be finished so long as food is manufactured and new articles are being put on the market; we will never be finished with the establishment of tolerances. There may be, for example, new machines for making bottles which make bottles more uniformly than now. Frequent readjustment of tolerances will be necessary, but on the main articles, on the ordinary packages, I should imagine, if necessary, we would be in a position to act in about a year.

Mr. MCLAUGHLIN of Michigan. As I remember Dr. Alsberg's statement made when we were first here, it seems to me that the statements made now are directly in conflict with his first statements as to the advisability and feasibility; and you might say the possibility of operating under this law if the making of tolerances was mandatory.

Dr. ALSBERG. In what respect?

Mr. MCLAUGHLIN of Michigan. Have you changed your mind entirely as to the feasibility of this amendment?

Dr. ALSBERG. I do not think so.

Mr. MCLAUGHLIN of Michigan. I understood you when you spoke before on this subject, that you said it would be practically impossible to operate under this law if you were required positively to establish a tolerance in each case. Now, what the solicitor says is contrary to that. I do not know whether you agree with him or not. If you do agree with him, it would seem to me exactly contrary to what you said before.

Dr. ALSBERG. I do not recall that.

Mr. WILLIAMS. I was speaking from a legal standpoint and not from the practical standpoint.

Dr. ALSBERG. I do not remember just what statement of mine made two days ago you have reference to. I think I said two days ago that the reason I personally preferred to have it optional rather than mandatory was because if you establish a tolerance you have to make that tolerance broad enough to enable the unskillful manufacturer who is honest and has not the most modern machinery to do business, whereas the very skillful man who has the latest machinery may not need as wide a tolerance. I was afraid that the establishment of the tolerance would give the very skillful man with modern machinery and very up-to-date methods a certain advantage which he might use to the disadvantage of some of his competitors. If you declare a tolerance of a fourth of an ounce on a given package, there might be a manufacturer who was able to operate within an eighth of an ounce. He would have the advantage of one-eighth ounce to the pound, say, over his competitors who could not operate within a fourth of an ounce. For that reason I thought it unwise to make the declaration of tolerances obligatory. Was that the statement you refer to, Mr. McLaughlin?

Mr. MCLAUGHLIN of Michigan. I do not remember the words you used but I got a certain impression from it from what you did say. I am getting another impression now. It may be my fault.

Dr. ALSBERG. I do not think so far as enforcement is concerned that it will make it impossible to enforce the law if this change is

made. I do believe that if it is made mandatory to establish tolerances in all cases there will be cases in which manufacturers with greater skill will be able to take advantage of the tolerance to the disadvantage of the consumer and of their competitors.

For instance, the little creamery can not operate as close on a print of butter as the big creamery.

Mr. McLAUGHLIN of Michigan. I understand that 16 per cent of butter is arrived at in this way, and that 12, 13 or 14 per cent is enough, which is all the moisture the butter ought to contain, and if it contains 16 per cent it is done with a dishonest purpose.

Dr. ALSBERG. I think I understand now the statement of mine you are referring to. You are quite right. You are referring to my statement with reference to the desirability of establishing standards not involved in this particular issue. I did say I thought it undesirable to establish numerical standards for large lines of products like milk and other things.

Mr. McLAUGHLIN of Michigan. No; you were talking in that connection about the standardization of food products. You were not discussing the advisability of amending from "may" to "shall" in the matter of tolerances.

Dr. ALSBERG. That is true, that standardization does not apply to this particular amendment.

Mr. McLAUGHLIN of Michigan. That is tolerances.

Dr. ALSBERG. No. The Bureau of Internal Revenue has established a tolerance of 16 per cent with butter. That, of course, is not the type of tolerances under consideration here. Our tolerance here would have nothing to do with the composition of the product or how much would go into the product. I did not mean to imply in anything I said about milk or butter, that that particular view of mine had a bearing on this amendment. That had reference to the letter which the Secretary of Agriculture wrote to the chairman of this committee.

Mr. WILSON. Does not nearly every concern take advantage of the different tolerances that you create?

Dr. ALSBERG. As far as they are able to.

Mr. WILSON. That is what I meant.

Dr. ALSBERG. The skillful man with high-class experts, big enough and financially strong enough to employ high-class experts, has the advantage, and there is not any question that anything that is done in the line of legislation of this type gives a certain advantage to the big concern over the small concern. That is inevitable in any kind of legislation that you may desire.

Mr. WILSON. I suppose that every one would take advantage of his particular tolerance.

Dr. ALSBERG. He would be compelled to.

Mr. McKINLEY. It is simply standardization.

Mr. WILSON. That is true.

The CHAIRMAN. What have you to say to the second amendment, allowing a reasonable time for the disposal of the stock of goods on hand?

Dr. ALSBERG. That is just a question of whether you want to permit a man who has a fraudulent package to use up his fraudulent packages. I personally feel that some of these packages are borderline packages, but we brought a number here which we do not

as very objectionable so as to give the committee a fair idea of what is going on, and not misrepresent the situation.

Mr. WILSON. Is there any way for you to distinguish?

Mr. PURNELL. Between the fellow who has a package that is on its face unfair and fraudulent and the man who deliberately creates a false package?

Dr. ALSBERG. No, except personal judgment.

Mr. PURNELL. My notion is as far as we can do it we ought to protect the fellow who is honest and caught in a bad position but we ought not to let the fellow go who has deliberately created the situation.

Dr. ALSBERG. That is the way we feel about it.

Mr. WILSON. But your law does not make that possible.

Dr. ALSBERG. The law does not make that provision. We do not know of any way you could distinguish until this stock on hand was used up between the deliberate and intentional fraud, between the man who had a fraudulent package that was not so very bad and the man whose package ought to go off the market at once.

The CHAIRMAN. How was the matter handled under the pure food and drugs act when the labeling was required?

Dr. ALSBERG. For the pure food act?

The CHAIRMAN. Yes.

Dr. ALSBERG. My memory does not go back to those days.

The CHAIRMAN. The testimony before the committee indicates that 18 months were given in a number of instances.

Dr. ALSBERG. The Gould amendment, which is that part of the food and drugs act that will be changed if this proposed bill becomes effective, provided that no one should be prosecuted for a violation of that amendment for 18 months after it went into effect. That is to say, it was made effective at once but no one could be punished for 18 months after it became effective.

The CHAIRMAN. Did that work out satisfactorily?

Dr. ALSBERG. I think it did.

Mr. HORIGAN. After 18 months after the passage of the act a package could be seized if misbranded?

Dr. ALSBERG. It worked all right. It was a somewhat different statute. Before that amendment was enacted there was no need to state on the label how much was in the package. The Gould amendment demanded that there be a statement on the outside of the package of how much food was in it. There was not necessarily any question of fraud involved because the Gould amendment simply put an additional requirement on the food manufacturer. It did not necessitate changing anything except the label, which could be changed by printing a new label or putting a sticker on the old label. There are still packages on the market, brands that move slowly, where the total number of packages sold by the manufacturer is very few in one year, and a large number of labels had been printed, with the sticker on. The sticker is perfectly satisfactory if it is on tight, because it is more conspicuous than the print on the label of the same size. The sticker hits your eye at once.

The CHAIRMAN. What are your suggestions as to this amendment.

Dr. ALSBERG. My own suggestion would be that if you want to take care of these people who are not very blameworthy in this particular matter, you confer upon the Secretary of Agriculture or,

if you wish, upon the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of the Treasury—it having been a custom for them to be a committee to make regulations always in the past—authority to exempt certain definite types of packages for 18 months that in their judgment deserve exemption.

The CHAIRMAN. Not to exceed 18 months.

Mr. MCKINLEY. That is simply giving them power that they would have.

Dr. ALSBERG. Not quite, sir.

Mr. WILSON. You would have it for 18 months?

Dr. ALSBERG. The bill as it stands now would be for that time.

Mr. MCKINLEY. That would leave it to you to say whether anything is wrong or right, as it was left with Dr. Harvey Wiley to say what whisky was.

Dr. ALSBERG. It would authorize the department to do it. As it is now, it would have no such authority. You could even make it mandatory on the three Secretaries. Then we could take care of the package that was clearly fraudulent in the 18 months, and say that package can not continue, but that where there are extenuating circumstances, there might be 18 months' grace. I think there are only these alternatives. Either the law must go into effect after a given period of grace, say, 18 months, or else you must give the three Secretaries, or somebody, discretion in making specific exemptions for 18 months. I do not think you can write into the bill anything that will take care of specific cases.

Mr. WILSON. If you had this discretion, as to the 18 months, you could say to the manufacturer, you have got to take this off the market now.

Dr. ALSBERG. Yes.

Mr. ANDERSON. Or else fill the package.

Dr. ALSBERG. Or else fill the package.

Mr. WILSON. You would not have to give them 18 months to dispose of them?

Dr. ALSBERG. No.

Mr. WILSON. But take some slight mistake made by a manufacturer with no criminal intent of fraud, you could give him 18 months to dispose of his stuff, but where you find a criminal intent to defraud, then you would have a right to say to these people, you have been trying to defraud the people and you have got to take this off the market and suffer the consequences. That is the way it looks to me.

Mr. MCLAUGHLIN of Michigan. As to this word "shall" and "may," I would say that it is not unusual to have criminal statutes so drawn that their execution depends upon somebody's opinion. We have statutes against false representation and so on. One can make false representations respecting goods that he is selling, but if those representations are not such as are calculated to deceive a person of reasonable intelligence exercising reasonable care, the representations are not criminal. It is so with uttering counterfeit money. If it is shrewdly made and likely to deceive anybody, then it is criminal, but if it is so crude and so illy made that anyone can see it when it is offered to him, there is a serious doubt in my mind whether a person would be guilty of uttering it. There are a lot of statutes where the question of whether a man is guilty or not and ought to be prosecuted is a matter of opinion.

As far as I can see, I should object to putting the word "shall" in because it would make it obligatory on the department to establish a standard of tolerance in every single case, and until those tolerances were established you could not enter upon the execution of this law at all.

Dr. ALSBERG. Of course, we have to use our judgment in every case we recommend.

Mr. WILSON. Would you want to use your judgment to such an extent that you could possibly destroy an old, long-established trademark?

Dr. ALSBERG. No. But you can not enact any law which will eliminate the judgment of the administrative officer in its enforcement or which does not give the administrative officer authority, so far as the courts fail to hold him in check, to do that if he wants to be arbitrary. There is not anything you can do that is going to make it impossible for an arbitrary executive officer to do a great deal of mischief and damage in any line. We have to exercise our judgment in all the recommendations we make to the courts. We do not recommend to the courts prosecutions, I think, in one case in five.

The CHAIRMAN. As the time is getting short, we will resume hearing Mr. Williams.

Mr. WILLIAMS. I presume that finishes the "may" and "shall" amendment.

The CHAIRMAN. The third amendment is: Page 2, line 7, after the word "filled," insert the words "so far as is consistent with good commercial practice." What do you think of that?

Mr. WILLIAMS. Mr. Chairman, that amendment worries me. On the face of it, it would seem fair that if these cans are filled according to "good commercial practice" it might be all right, but it writes into the law an indefinite term. It gives a man who wants to violate the law a peg on which to hang his defense. If he is haled into court he will say, "My can is filled according to good commercial practice." Now, what is "good commercial practice"? To make this law effective, we would probably have to get a court decision on "good commercial practice." I do not know what it is. It is hard to define. Is "good commercial practice" a practice which is approved by a majority of the trade regardless of its detrimental effect on the consumer?

Mr. JACOWAY. There is an illustration of that. It is good commercial practice for anybody down South to take a piece from a bale of cotton, as a sample, and it causes a waste of 250,000 bales of cotton a year; still it is good commercial practice.

Mr. WILLIAMS. They all consent to it. Let me tell you this in reference to good commercial practice: When this matter of slack filling was first brought to the attention of the department, about six or eight months ago, the Bureau of Chemistry sent it over to me for an opinion, and I advised them we could not make a case under the food and drugs act. However, we did find a can which had a particular statement on it under which I thought we could make a case. So we did. That can was about one-third filled. The manufacturer and other representatives of the trade came to see me. He said, in substance: "Mr. Williams, I admit this is wrong, but I am not an isolated case; they are all doing it. This has become a standard in the trade." I asked: "How did that come about?"

He said: "It came about this way. We had been putting out 5 and 10 cent packages. The price of the raw materials that we used in this product went up and the retail grocer told us that they wanted us to continue that 5 and 10 cent package. So we continued the 5 and 10 cents package by cutting out two-thirds of the contents. We are all doing that." You will observe that he said that this practice had become "a standard in the trade," agreed to by the retail grocers and by the manufacturers. Is that good commercial practice? It is a practice which is recognized by the trade—not only by the manufacturer but by the retail grocer—and it is detrimental to the consumer.

The use of such an amendment would write into this law an indefinite term, and I think it would be better if you did not put it there. It would give a peg to the dishonest man upon which to hang his defense.

Mr. McKINLEY. You say you would probably have to get a court decision on that. What is the objection to that?

Mr. WILLIAMS. That would mean a long fight and long delay and then even if we got one court decision on it the other fellow would come in and say his alleged misconduct occurred under "good commercial practice" and that the decision should be measured by the facts in the particular case. They would submit it to the jury as to whether his conduct was "good commercial practice" in the circumstances.

Mr. WILSON. Would not good commercial practice last year be good commercial practice in future years?

Mr. WILLIAMS. It might and it might not. It would depend upon the particular circumstances at the time.

Mr. McLAUGHLIN of Michigan. Is it not true there would be a court decision in each particular case by itself?

Mr. McKINLEY. You would have to have a court decision every time.

Mr. WILLIAMS. You see in each case you would put it in the power of the defense to make it a question of fact for the jury to determine as to whether it was "good commercial practice."

Mr. McLAUGHLIN of Michigan. They would not be able to. What would be the character of the testimony? How would commercial practice be established? It would be by bringing in those who indulged in it; manufacturers from all over the country who indulged in that very practice. They would be the only ones who could testify as to whether it was good commercial practice or not.

Mr. WILLIAMS. That is the trouble.

Mr. McLAUGHLIN of Michigan. And that would be the only testimony before the court.

Mr. WILLIAMS. That would be the only testimony before the court, and these members of the trade would be the only people who would be qualified to testify. Take the case I mentioned a while ago. They were all engaged in the practice of "slack filling," and said it had become a custom in the trade. As an illustration, I might refer to the rule applied by the courts in negligence cases arising out of of the failure of railroad companies to use proper appliances and rolling stock. The rule is, in substance, that if it is shown that the appliances used by the defendant railroad company are such as are used by ordinarily well-conducted railroads there is no negligence in that respect. If they bring up these manufacturers in a case unde

the proposed amendment and they all say, "We are engaged in the practice"; and if we were compelled to follow that principle in these cases we would be at a standstill.

Mr. JACOWAY. I get your idea that if we write this principle of good commercial practice into the law we would have an indefinite term in the law, and I get your idea also that each case would be decided upon the circumstances surrounding that particular case. Now, the question is, would you have enough attorneys in the department down there to enforce the law? In other words, you would have a congested docket and would you ever get to the end of that work?

Mr. WILLIAMS. We would be kept busy. We had 6,000 cases this year.

Mr. MCKINLEY. What has been brought to our attention particularly is slack filling of packages, which shows very plainly, some one-third and some one-half filled, and it would be maintained that it is not good commercial practice to do that because it deceives the people, and also, economically, it uses up twice as much tin. Is it not a fact that with most courts it is a custom to follow the decisions? One court makes a decision and the other courts follow that.

Mr. WILLIAMS. On questions of law that is true, but in each case they take the principle of law declared by the Supreme Court and apply it to the particular facts in the case under consideration. This question as to what would be "good commercial practice" would be a question of fact.

Mr. MCKINLEY. But if the court decided that it is bad commercial practice to put out a package half filled, and that is established by the Supreme Court, do you think another court would decide another way?

Mr. WILLIAMS. If they change the facts they change the situation.

Mr. MCKINLEY. But it is a package half filled.

Mr. WILLIAMS. That is true; if we could just say to the court, here is a package half filled, without showing anything else.

Mr. MCKINLEY. Why can you not?

Mr. WILLIAMS. Because they would bring in questions of evidence. It would be a question of fact for the jury to determine in each case—whether or not it is "good commercial practice." The proposed amendment, I think, will afford a line of excuses on which to hang a defense. Of course, the honest man is all right, but it is the dishonest man against whom the law is directed. Do not put it in unless it is necessary for the protection of the honest man. It is not necessary for his protection. This amendment provides, "when it shall be filled with the food it purports to contain." The tolerance will be allowed where it ought to be allowed. Furthermore, the bill as written provides for "reasonable tolerances." Now, if we were going to a jury on the question as to whether or not the tolerance is reasonable, the ordinary man who sits on a jury can determine whether it is reasonable; but when it comes to the ordinary man determining whether it is "good commercial practice," then you have the juror in a position where he can not use his own common sense and he has got to rely on expert testimony.

Mr. MCKINLEY. You have stated here that you have got to make tolerances. The doctor has stated that you do not put out tolerances;

that you have some private, secret tolerances that you decided for yourselves, but the manufacturer has not these.

Mr. WILLIAMS. In looking at it from the manufacturer's standpoint, I do not see why he should request the use of the words "good commercial practice," when the law says we may permit reasonable tolerances.

Mr. MCKINLEY. But if you do not put them out, he has no protection there. The doctor has stated that you do not give out tolerances.

Mr. WILLIAMS. There are some particular tolerances which have not been given out, but there is a general rule of tolerances which has been declared by the department.

Mr. MCKINLEY. And published?

Mr. WILLIAMS. Yes. In that general rule we recognize good commercial practice, whatever it may be. That is, in establishing these tolerances they go all through the trade and try to see what each man is doing in order to arrive at a just conclusion. I do not think it is necessary to write these words in; it will make the law very difficult to enforce. You have to leave to the administrative department some discretion; we must assume that they will have some common sense. When you make the law too loose on the other side, you give the crooked man a chance. It does not bother the honest man; it is the crooked one who should worry. If a man tries to do right he is not going to be punished.

Furthermore, so far as this kind of a case is concerned, we try to get these misbranded articles in interstate commerce and prevent their being delivered to the consumer. We do not destroy good food. The Department of Agriculture has the Department of Justice say to these people, "Do not move this until it is labeled properly; have it labeled properly and then you can sell it." It is usually not a question of the destruction of the goods. I think it would be a mistake to write in those words, "good commercial practice."

Mr. PURNELL. Under the tolerances you say are now published, how do you arrive at what is good commercial practice?

Mr. WILLIAMS. Nobody knows what is good commercial practice.

Mr. PURNELL. You have to interpret it.

Mr. WILLIAMS. They do this. They go around to the trade, to each man's factory, and see how everybody is putting up their goods. They look at the machinery and then after having had opinions from the trade as to what would be proper, they declare a tolerance. The members of the trade are given a hearing and they can come and say what ought to be done, and the department takes into consideration every argument and statement and in that way arrives at a just conclusion. According to that procedure, I do not see any chance of injustice.

The CHAIRMAN. A law of this kind should not be worded so as to affect loose packages, such as sacks, should it?

Mr. WILLIAMS. I do not see in the administration of it why it would be applied in cases of sacks. I doubt it. However, I would not like to express that as an opinion. It would depend upon particular circumstances. It is not difficult to tell when the sack is really filled. It may not be deceptive to have a little space in the sack. There is not as much chance for deception in the sack as in a tight can, into which you can not see. Take a sack and set it up on end and you can see how much is in it. I do not believe we would have any difficulty with that, Mr. Chairman.

[illegible]

Mr. [illegible]. I think that the court would say in effect [illegible] from the evidence that this [illegible] as would deceive an ordinarily reasonable man [illegible]

Mr. McLaughlin of Michigan. Then he would write something [illegible] that is not there.

Mr. Williams. I have no doubt that he would give it that interpretation.

Mr. Fenn. How could the shape or form of a container deceive or mislead the purchaser as to the origin of the food therein?

Mr. Williams. I have no particular case in mind.

Mr. Aiken. A good example is a bottle of carbonated cider gotten up to look like imported champagne.

The Chairman. We will now hear Mr. Lannen on the amendments which he wishes to propose.

STATEMENT OF MR. THOMAS E. LANNEN, COUNSEL NATIONAL CONFECTIONERS' ASSOCIATION OF THE UNITED STATES—Resumed.

Mr. Lannen. I would say if the solicitor is going to discuss the amendment which I offered yesterday, after thinking it over and anticipating what the department would probably argue here to-day, I have formed another amendment which I think will bear on some of the objections of the department, and I think it would be well to state that amendment now so the solicitor might state something on it.

Mr. Williams. You have reference to the amendment with regard to guilty intent?

Mr. Lannen. Yes: the amendment with regard to the form of packages.

Mr. McKinley. Where?

Mr. Lannen. On page 3, line 25. The amendment that I suggest now is to strike out the words "so as" in line 25, page 3, after the word "shaped" and insert immediately after the word "shaped" the words "that it evidences a fraudulent intent."

Mr. McLaughlin of Michigan. You would not need the word "fraudulent" if it evidences an intent to deceive.

Mr. Lannen. I had not thought about that. That is all right. The reason I suggest that change is this: That will confine the testi-

[illegible] package itself [illegible] the [illegible] of the package [illegible] Therefore, the [illegible] of the package itself.

Mr. [illegible] Are you saying the act, that it would all [illegible] of the package itself?

Mr. LANNEN. I think so, according to the wording of this amendment.

Mr. [illegible] I do not get it. [illegible] with the intent.

Mr. LANNEN. [illegible] the law would then read, speaking of the passage now:

If it be in a container made, formed, [illegible] or [illegible] as to mislead the purchaser as to the quantity, quality, size, [illegible] therein.

Mr. McLAUGHLIN of Michigan. The container might be of such shape, size, and so on, as to deceive the ordinary purchaser, although the manufacturer had no such intent, and it would actually deceive. What are you going to do about that?

Mr. LANNEN. That is the reason I suggested that the element of fraudulent intent be [illegible] out of the bill. If you leave it as it stands now, Mr. Congressman, many a package might deceive a purchaser without any [illegible] being done.

Mr. McLAUGHLIN of Michigan. What do you think of my suggestion a while ago and the remarks I made and the question I asked, that it must be reasonably calculated to deceive?

Mr. LANNEN. I agree with you.

Mr. McLAUGHLIN of Michigan. My [illegible] was that if it is such a thing that people are [illegible] and consumers deceived, the manufacturer must stop that [illegible]

Mr. LANNEN. Here is a package [illegible] product the manufacturer has put in the package a [illegible] with directions for the housewife to put that [illegible] and [illegible] both flavor and color in this particular product as she [illegible] prepares it for food. Then she will have a product that [illegible] fresh in flavor and enjoyable, otherwise the flavor might [illegible] on the shelves of the grocer, evaporate or become a poor flavor in this product. The product would be in the paper box, and the atmosphere could get at the whole product and the flavor might deteriorate in the product, but when the housewife puts the flavor into the product, the minute she makes the product or puts it on the stove she then gets a fresh flavor. I do not know what contention the department is making in regard to this package. It was on the table here as a fraudulent package, perhaps because it contained this bottle, or because there was space in here into which this bottle was put, or something of that kind. I do not know what the department had in mind about this package, but it may be a case in which the manufacturer is innocent. He simply occupied this space here with the bottle.

Mr. WARD. He sells the whole business, does he not?

Mr. LANNEN. He sells the whole thing. Perhaps the officials want the bottle tied on a string on the outside of the package.

the housewife will see it. I do not know of any other way of getting around it.

One other amendment that I have to suggest here, Mr. Chairman, in order that the solicitor might address himself to it——

Mr. JACOWAY. Mr. McLaughlin, before you get away from that page 3, I want to ask you what you think about striking out, in line 25, the words "so as" and inserting the word "calculated," so it would then read, "Or if it be in a container, made, formed, or shaped, calculated to deceive"?

Mr. LANNEN. Would that imply the element of real guilty intent on the part of the manufacturer?

Mr. MCLAUGHLIN of Michigan. It would reach the result, if it is something that actually does deceive the people.

Mr. LANNEN. That is the point, would it accomplish that?

Mr. MCLAUGHLIN of Michigan. If it actually does deceive the people, then the question of the intent of the owner who makes it is not material. He must desist from the practice of uniformly and regularly deceiving the people. Is that true? Would you agree with me on that?

Mr. LANNEN. He must desist from that. I agree with you. But supposing he puts out a food product in a package in the form of a Dutch wind mill, and supposing that product is oatmeal or candy, or some other product of that kind. Would that package lead a purchaser to believe that the product was put up in Holland by reason of the form of the package, or that Holland had something to do with it? That would be the contention that would be made by the department. It is that kind of innocent things that have no real criminal foundation to them that we want to guard against.

Mr. MCLAUGHLIN of Michigan. It would depend upon the inscription. If the word "Holland" was put on so big that nobody could see anything else but that word "Holland," I would say that it might be calculated to deceive in the respect that you suggest; otherwise, if the inscription was in the ordinary type, one would be expected to read it and know what he was buying; otherwise no reasonable person would know he was buying partly a product and partly something to look at.

Mr. LANNEN. But under this bill labeling is done away with. That is the point I was making yesterday.

Mr. MCLAUGHLIN of Michigan. How?

Mr. LANNEN. The department has stated at these hearings that people do not read labels, that the housewife does not read the labels.

Mr. MCLAUGHLIN of Michigan. We can not pass a law to protect a person who does not read.

Mr. LANNEN. This law is solely on the package itself, and it must stand or fall on its shape. I am going to suggest another amendment:

On page 4, line 2, after the word "therein," insert the words "upon a reasonable inspection of the outside of the package."

On page 2, line 7, after the word "package," insert the words "evidences an intention of not having been filled with the food it contains for the purposes of fraud and deception."

Mr. WILSON. Is that in lieu of the amendment you gave yesterday?

Mr. LANNEN. That is in lieu of the amendment, so as to confine

it to the package and relieve the department of the necessity of proving what the manufacturer intended, so the package will bear its own evidence of guilt or innocence.

Mr. WILSON. What is that amendment again?

Mr. LANNEN. After the word "package" in line 7 on page 2 insert the words, "evidences an intention of not having been filled with the food it contains for the purpose of fraud and deception." Then the paragraph will read:

An article of food shall be deemed to be misbranded if in package form and irrespective of whether or not the quantity of contents be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, as provided in the preceding paragraph, the package evidences an intention of not having been filled with the food contained for the purpose of fraud and deception.

Striking out all the words now in line 7 after the word "package," and all the words in line 8 up to and including the word "contain."

Those, I think, will confine the question to the package itself.

The CHAIRMAN. Is that all, Mr. Lannen?

Mr. LANNEN. That is all I have to suggest.

Mr. WILLIAMS. Mr. Lannen says, in his opinion, the language which he has just suggested will confine the question of intent to the package itself. I disagree with him, but before I take that up, let me give you this thought which runs in my mind. I believe Mr. Lannen agrees with me that if this law is to be a perfect measure and give the consumer the protection he should have, the consumer should be protected not only against the criminal intent of the manufacturer, but also against the negligence of the manufacturer's employees and also against the mistakes of the manufacturer's employees. You see, under the food and drugs act, after these misbranded articles go into interstate commerce, we have the power to go and find them in interstate commerce and stop them and say, "Hold up here, this is an illegal article. Put a proper brand on it, put a proper label on it, and then you can go and sell it." In that we keep it from reaching the consumer after it starts.

You will remember that in the Hippolite Egg case, which was one of Mr. Lannen's cases, the Supreme Court referred to these misbranded articles as outlaws, and stated that the articles themselves were the offending things, regardless of the intent of the manufacturers. They were the outlaws, they were the things that were going to cause damage if they got loose, regardless of the intent which might have entered into their preparation.

We might illustrate the situation in this way: Suppose we have a big ship and a submarine, and that a torpedo is released from the tube of the submarine, intentionally aimed at the ship. The torpedo starts toward the ship. Let us assume that the torpedo instead of being intentionally aimed at the ship was turned loose by mistake or was negligently discharged in the direction of the ship. It does not matter to the people on the ship whether there was an intent behind the gun, or whether the torpedo was discharged negligently or by accident without negligence. If the torpedo strikes, the result is just the same.

So, here, if these articles, having been put in interstate commerce, get out of interstate commerce and reach the consumer, they have struck their mark, and the consumer has been damaged, regardless

of the intent with which it was manufactured. It may be that in a particular instance the consumer has not been damaged much, but when you consider the aggregate, the damage is very material. It might not hurt for one housewife to pay the full price for half a can of peas, but when you add up the total it is a quite different proposition. If she goes to the grocer and buys a can of peas at the old price and she only gets half a can of peas, she naturally wonders why, at the end of the month, the cost of living is so high. She remembers that she paid the old price; but the answer is, she has only gotten half of what she paid for. She is damaged regardless of the intent. If you gentlemen could pass a law which would arrest in its course a bullet which was negligently discharged from a gun, which bullet if continued in its course might strike a man, you would not hestiate. That is physically impossible. But here it is physically possible to protect the consumer not only against intent but also against negligence and mistake.

Mr. Lannen says that this language would confine the deception to the article itself.

Mr. LANNEN. To the package itself.

Mr. WILLIAMS. When I say article, I mean package. His first amendment was on page 3, line 25. He says, after the word "shaped," to strike out the words "so as" and insert "that if it evidences a fraudulent intent," so that it would then read "or if it be in a container made, formed, or shaped that it evidences a fraudulent intent to deceive," etc.

Mr. MCLAUGHLIN of Michigan. What difference does it make whether it is a fraudulent intent or an honest intent to deceive, or a different kind of intent to deceive?

Mr. WILLIAMS. That is what I can not understand. He says "so shaped that it evidences a fraudulent intent to deceive." Where is that intent? The package is inanimate; it has no mind; it can have no intent. It is a stray bullet; it is a torpedo fired either negligently or on purpose. The words "if it evidences an intent" mean, in my opinion, that "if it is so shaped as to evidence the fact that the manufacturer when he prepared it intended that it should deceive." That is the construction that the courts would put on that language, I fear. It seems clear to me. "So shaped as to evidence a fraudulent intent." A fraudulent intent on the part of whom or what? The intent is there as a necessary element, and we would have to prove it.

Mr. LANNEN. Before you get off that question of intent. Supposing it is an innocent proposition. There is no element of intent in this bill now. Supposing a box of candy is put out in the form, let us say, of an imitation of an apple. The consumer might be deceived into thinking he might get some apples in that little package, or something having to do with apples. Would there be any real criminal intent there?

Mr. WILLIAMS. Well, I do not know whether there would be any criminal intent or not. It depends upon the degree of damage that the consumer is going to suffer when he buys an article that is put up in that form.

Mr. LANNEN. I want intent in here. I do not want an innocent thing that was conceived innocently and works no real harm condemned.

Mr. McLAUGHLIN of Michigan. Do you not care anything about the effect of it? You are talking now about intent. What about the effect of it?

Mr. LANNEN. If the effect is criminal and has some substance to it——

Mr. McLAUGHLIN of Michigan. If the effect is deceptive.

Mr. LANNEN. If it is an innocent deception that works no harm to anybody, such as where a person might guess wrong as to what is in a package by looking at it, and yet not be harmed in any way, that is what I mean.

Mr. McLAUGHLIN of Michigan. A man who buys it may not be harmed, except he is separated from his money for something he thinks he is getting that he is not getting.

Mr. WILSON. Does not the package have to have printed on it always what is in it?

Mr. McLAUGHLIN of Michigan. Yes; and that is what Mr. Lannen says about "upon reasonable inspection of the outside of the package." Take a package that is labeled, we will say, "Vermont maple sirup." A person looks at it, and in the small print it says, "This is not Vermont maple sirup. This was made in New Orleans, La., and is blackstrap, in fact." Now, would you require a purchaser to read those things. Would you blame him if he had been misled into believing that it was Vermont maple sirup?

Mr. LANNEN. Well, the food law covers that now, Mr. Congressman, fully. I was speaking particularly about this amendment. That feature you speak of is already covered by the food law and can be handled under the food law now, and has been handled, and they are bringing cases on such points every day. I am speaking about this particular amendment. The food law takes care of the other features you are speaking of now.

Mr. McLAUGHLIN of Michigan. I am differing from you only on this, Mr. Lannen, in this respect: If there is a practice that is calculated to deceive and the effect and the result of which is that people are deceived, should not we relieve that situation, even if we are unable to prove a guilty intent on the part of the one who indulges in the practice?

Mr. LANNEN. That is all right, if the package is calculated to deceive; I agree with you. That shows bad faith.

Mr. McLAUGHLIN of Michigan. I suggested the use of the word "calculated," and my impression is that you did not approve of it, but you wanted your words put in.

Mr. LANNEN. No, Mr. Congressman, I stated that if that would accomplish the object I was aiming at, it is agreeable to me.

Mr. McLAUGHLIN of Michigan. Pardon me.

Mr. LANNEN. I agree with you on that, if what you said about what it would accomplish is true, and I think perhaps it is.

Mr. WILLIAMS. May I suggest for your consideration the question as to whether it would be advisable to use the word "calculated?" I would be a little afraid of it. "Calculated to deceive." Now, we go into court and the lawyer for the defense might say, in effect, "Well, the old food and drugs act has the language, 'Whether or not it deceives or misleads.' That has been construed by the courts as having to do with the effect on a reasonable man or an ordinary purchaser. Now, here comes along the Congress and writes in the

words 'calculated to deceive.' Congress evidently intended something, evidently intended a different interpretation of that act, for they now say 'If it be so shaped that it is calculated to deceive.' Who calculates? Whose calculation was it—the calculation of the manufacturer? Yes." And the Government would probably be required to prove that the manufacturer "calculated" or intended to deceive the purchaser.

Mr. McLAUGHLIN of Michigan. I do not think that would be the meaning of the word that would be arrived at. The court would give a definition to it and would say, "calculated in that sense means that the reasonable and ordinary effect of it is to deceive."

Mr. WILLIAMS. I would prefer the present language, because it is in accordance with the language of the old law, and all the courts, in trying these cases, have usually read into it the interpretation that it must deceive the ordinary purchaser.

Mr. McLAUGHLIN of Michigan. You think that is the correct interpretation?

Mr. WILLIAMS. I believe that if it deceives the ordinary purchaser it should be condemned. We might put in there "to deceive or mislead the ordinary purchaser."

Mr. CANDLER. Is that the language of the old statute, Mr. Williams?

Mr. WILLIAMS. Practically the same, mislead or deceive.

Mr. CANDLER. And the courts hold, under that, that it must be such as to reasonably deceive the ordinary purchaser?

Mr. WILLIAMS. That is the way they have charged the jury.

Mr. CANDLER. Well, they have construed this identical language, or substantially this language?

Mr. WILLIAMS. Yes.

Mr. CANDLER. Then, if you provide for fraudulent intent, you have got to introduce evidence upon that before you can secure a conviction under the statute?

Mr. WILLIAMS. Yes.

Mr. CANDLER. It is hard to prove intent sometimes.

Mr. WILLIAMS. Very hard, especially as to fraud.

Mr. JACOWAY. Have all these terms, as a whole, been construed and interpreted by the Supreme Court?

Mr. WILLIAMS. I do not believe all of them have been interpreted by the Supreme Court, but I am speaking of what we find the trial judge saying about them.

Mr. JACOWAY. Have they construed them?

Mr. WILLIAMS. Yes, they have construed them. Practically all these terms have been before the trial courts at one time or another. All of them have not reached the Supreme Court, but a great many of them have.

Mr. CANDLER. Under the language that was suggested a while ago you would have to bring a case in order to get a decision before you could enforce the statute. A United States district judge in one district might construe it in one way, and a United States district judge in another district might construe it in another way, and you would have to go to the Supreme Court before you would get a final decision.

Mr. WILLIAMS. Yes.

Mr. JACOWAY. The laboring oar would be in the hands of the prosecution. You would have to make out your case beyond a reasonable doubt?

Mr. WILLIAMS. They do this. They say that in seizure cases, where we have held it up in interstate commerce, where, as I have illustrated, we have stopped this bullet on its way to the consumer—they say that the burden of proof is more than the preponderance of the evidence, but they do not put it beyond a reasonable doubt. They strike a sort of intermediate ground between an ordinary civil action and the ordinary criminal prosecution.

Mr. JACOWAY. You have got to make out more than a prima facie case.

Mr. WILLIAMS. Yes.

Mr. JACOWAY. You have got to make out a case beyond a fair preponderance of the evidence?

Mr. WILLIAMS. Yes.

Mr. JACOWAY. Somewhere between that and beyond a reasonable doubt.

Mr. WILLIAMS. Yes, in the seizure cases. Under the other section it is beyond a reasonable doubt.

Mr. CANDLER. The purpose and intent of this statute is to protect the consumer from the damage he may receive, regardless of the intent by which the damage was brought about.

Mr. WILLIAMS. Precisely.

Mr. CANDLER. That is what we are trying to get at.

Mr. WILLIAMS. Precisely. Now, with reference to this intent, gentlemen, suppose you put in there this language that Mr. Lannen has suggested. It, to my mind, carries the intent back to the manufacturer. Suppose the manufacturer puts it up and he sells it to a wholesaler in New York City, and then the wholesaler ships it in interstate commerce. Where is the intent? If the intent was with the original manufacturer we could not catch that fellow, and it would allow these "bullets" to proceed; and I am afraid if "intent" were put in there we could not secure any effective administration of the law.

Mr. LANNEN. Would not that issue be in rem, Mr. Williams?

Mr. WILLIAMS. Yes, the proceeding would be in rem.

Mr. LANNEN. I mean under this law the issue would be in rem?

Mr. WILLIAMS. Yes. What difference does that make?

Mr. LANNEN. It makes all the difference in the world.

Mr. WILLIAMS. What?

Mr. LANNEN. You try the legality of the can, but you fine the manufacturer.

Mr. WILLIAMS. That is just what I have been trying to impress upon these gentlemen. In these seizure proceedings it is the article which is the offender. The Supreme Court itself has said that these articles are the offenders, they are the outlaws. That is just the point I wanted to bring out. The intent of the manufacturer has nothing to do with it. It is these packages which are the bullets that are turned loose and go to the consumer. It does not matter whether they were intentionally turned loose; it does not matter whether they were intentionally prepared as an exploding bullet or as the result of negligence or accident.

Mr. JACOWAY. You would have to stop them in the courts.

Mr. WILLIAMS. That is right.

Mr. MCLAUGHLIN of Michigan. The package itself might carry the intent?

Mr. WILLIAMS. Well, yes; but it might not carry an expressed intent.

The CHAIRMAN. In the enforcement of the act it would be difficult to prove the intent?

Mr. WILLIAMS. Yes.

The CHAIRMAN. And as a practical matter, it would make the law inoperative?

Mr. WILLIAMS. Ineffective, there is no doubt about it.

The CHAIRMAN. Is there anything more, Mr. Williams?

Mr. WILLIAMS. Nothing, unless the gentlemen desire to ask some questions.

The CHAIRMAN. Do you care to discuss any of these other amendments that Dr. Alsberg went over?

Mr. WILLIAMS. Do you mean as to the— —

The CHAIRMAN. As to "shall" and "may," and others proposed on on Monday and Tuesday. There are three.

Mr. WILLIAMS. I believe I did discuss "shall" and "may."

The CHAIRMAN. You were cut off.

Mr. WILLIAMS. I will leave this thought with you, gentlemen. I would prefer the word "may" in there, for this reason: It develops from what Dr. Alsberg says, that the tolerances for particular kinds of articles may have to be changed from time to time. If it is mandatory on the department to make a tolerance, and we have not made a tolerance that fits that particular article—it may be an article that has just come in on the market—and the attorney for the manufacturer may well go into court and say, "You can not bother me yet. The department has not declared a tolerance. The law as contemplated by Congress has not been carried out by the department, and until you declare your tolerance you can not get me." That might happen, no matter how big a fraud it might be.

The CHAIRMAN. One contention is that the Federal Trade Commission has the power to regulate what is proposed to correct in this bill.

Mr. WILLIAMS. Yes; I believe that objection is made in opposition to the whole amendment. The Federal Trade Commission has jurisdiction of unfair competition methods. I believe that is the language of the statute. The Federal Trade Commission act looks at the whole situation from the standpoint of the trade, unfair competition within the trade. The law which you have under consideration contemplates the situation from the viewpoint of the consumer. What might be fair to the trade might not be fair to the consumer, as I illustrated to you a while ago, where I mentioned the case in which it was stated to me that all of a certain branch of the trade had agreed to slack fill—where this man told me it was a standard in the trade.

The Federal Trade Commission act I do not believe would reach that situation. This is from the consumers' standpoint. The Federal Trade Commission handles the matter from the trade standpoint, and, furthermore, while the illustration that I have given you is apt, we might find an agreement between them that they would do so and so, and we know we have a lot of agreements these days among the trade as to different things. Then, too, this procedure under this food and drug amendment would allow us to stop these

bullets before they reached their marks. It gives a relief which will be quick, but with this procedure if the manufacturer is not satisfied with the action of the department he can get a jury trial. Under the procedure pursuant to the Federal Trade Commission act the commission first files a complaint, and they cite him to a hearing to show cause; the commission then makes a finding. If the commission finds the alleged practice to be unfair competition, they order the manufacturer to desist. If he does not desist, then the commission may file the record in the circuit court of appeals and apply for an injunction. If the court grants the injunction, if the manufacturer obeys it, it is all right; but if he does not, then they have got to catch him, and, furthermore, in order to make it effective, after the first order of the Trade Commission is made, they have got to find out that he is not obeying that order in order to go to the circuit court of appeals.

Mr. LANNEN. You are making an argument there that the Federal Trade Commission can not settle these things, and you want an autocratic power to do it.

Mr. WILLIAMS. No, sir; not exactly that. I will say this, that so far as this particular kind of case in concerned this food and drugs procedure is more effective than the Federal Trade Commission law. Furthermore, the Federal Trade Commission law can be evaded by agreement between the parties in the trade as to what shall be a fair practice or an unfair practice, so far as trade competition goes. That is the point. This is quicker action, and a man can get a jury trial, if he wants it. This procedure is more effective, and is absolutely fair to the manufacturer. The honest manufacturer has no cause to complain.

The CHAIRMAN. Have you any knowledge of the Federal Trade Commission taking any action in this matter?

Mr. WILLIAMS. No, sir.

The CHAIRMAN. If they follow the practice of the trade, then they would have no jurisdiction?

Mr. WILLIAMS. I do not think so.

Mr. JACOWAY. When you speak of the trade, do you mean the retail trade or the manufacturing trade?

Mr. WILLIAMS. Of course, that would be determined under the Federal Trade Commission act. The wording of the act, I believe, is "unfair competition methods." I think there was some question as to what that meant. There was some question as to the definiteness of that, and as to whether it meant simply unfair trade competition. I do not know just how it was decided, or whether it was finally decided, but I remember there was some discussion as to what it meant. But under this proposed procedure, which I think is simple and fair, there would be a proper adjudication of the question, and we would get around any combination, and it may be that the Federal Trade Commission can not get around a combination with reference to trade practice.

Of course, if the combination went so far as to be a restraint of trade the Department of Justice might have jurisdiction under the antitrust laws, but I doubt the efficiency of the Federal Trade Commission act, if the trade should agree among themselves what is fair competition. However, that is merely an expression of my opinion, and I do not know that it has been adjudicated. The proposed procedure would be the safe way.

The CHAIRMAN. What have you to say as to the suggestion that the operation of the act be suspended until a certain specified time?

Mr. WILLIAMS. Mr. Chairman, we all want to be fair. We do not want to confiscate anybody's property. We do not want them to lose any investments that they may have made. It does seem unfortunate that in order to take care of the fellow who has not intended to do wrong we may have to let the other fellow get away.

The CHAIRMAN. What language would you suggest? Have you given it any thought?

Mr. WILLIAMS. I have not given that any thought, but I will prepare the proper language if you decide on just what you want.

The CHAIRMAN. The committee will be pleased to have your suggestions.

Mr. WILLIAMS. I think this would be sufficient:

This act shall not become effective until after the expiration of ——— months from the date of its approval.

I think that would be sufficient. Mr. Horrigan has just made a suggestion, and I will give that language a little more thought.

Mr. LANNEN. Mr. Chairman and gentlemen of the committee, it seems to me that there has been a lot of inconsistent argument here this morning about the use of the word "shall" and about the operation of this law, that it could not take effect for a long time, until tolerances are established, etc., and things of that kind. If that is true, there are a whole lot of manufacturers in this country who have been fined without warrant of any law. In 1913 the food and drug act was amended so as to define an article of food to be misbranded—

If in package form, the quantity of contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of section 3 of this act.

In both of those cases the word "shall" is used.

Now, then, the plea was made to you to follow the language of the old law, by Mr. Williams, because the court might look at the change and think that Congress evidenced an intent to place a different interpretation on the law, and that is the reason why he objected to the word "may." That argument is inconsistent because the word "shall" is now in the old law, and if you are going to follow the old law with respect to the establishment of tolerances, and not mix the courts up, you should use the word "shall" because there is identically the same provision in the old law as in the proposed law you are dealing with.

Mr. WILLIAMS. I did not say the courts had construed the use of the word "shall" in reference to tolerances, but it has construed the other language. If you want a decision on that, I shall be glad to furnish it.

Mr. LANNEN. I am not speaking about any decision; I am speaking about the law itself.

Mr. WILLIAMS. You were speaking about the reasons that I gave for that.

Mr. LANNEN. You said that if the committee uses the word "may" now in establishing tolerances as to these packages, that the courts will think that Congress intended a different meaning from what it intended in using the word "shall" in the old law. That is the point

you made, if I understood you. And so, to be consistent with that proposition, you should use the word "shall" here now.

At one time in the argument of Mr. Williams he stated that he wanted definite language in order to prevent any misconception in the law, and in order to prevent many trials, issues of fact, in many different courts. Gentlemen, this old food law is a general food law. It involves general issues of facts. Here is one evidence in the definition of adulteration of food: "If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed." That is a provision that raises an issue of fact.

I have a case of that kind pending right now that I am going to defend over in Grand Rapids, Mich., where the very proposition is urged by the department that the product is colored so as to conceal damage or inferiority or something of that kind. I have forgotten the language. But it raises an issue of fact. Let me tell you how an issue of fact of that kind would come up. Suppose you are putting out, we will say, a strawberry extract, and it is very highly concentrated, and it has more flavor in it, more real flavor that the housewife wants than is in an ordinary extract, but it is colored. Now, the question arises, does that color, the depth of color, indicate to the housewife that the extract contains more strawberry flavor than it really contains? There is your issue of fact, and so you bring in your chemists and they say, "No; this product has exactly as much flavor, or more flavor, than the color indicates," and the Government comes in and says, "No; it does not," and the issue goes to the jury. There is your issue of fact.

This whole existing law is written in general language, with one or two exceptions, where the language is specific.

That very situation, gentlemen, has led to this situation that was referred to about the courts looking to the action of Congress and the State legislatures. The tendency of the times has been to pass food laws and criminal acts in such broad and general language that it is almost impossible to understand what they mean. No lawyer can tell in advance exactly what a certain law may mean, and the court is often forced to the necessity of going into the history of the act to find out what the act itself means.

Now, I say to you, as Congressmen, that that is a bad form of criminal law, and it is the kind of law that we are fighting against here. I am asking you to make this law so specific that a reasonable, any honest, man can tell what it means. So that his conscience will guide him, if nothing else. I know, sitting in my office as an attorney, and all you gentlemen know, that when a man comes in to you with a case that has no merit in it, you know it; and you know whether he is trying to deceive or not, and you can tell him that; but when he submits two packages to you and he wants to know whether one is an infringement of the other, or whether one would make a person believe that he is getting a thing that is in the other one, I want to tell you gentlemen that it is a mighty hard proposition for an attorney to pass on. The best trade mark attorneys and patent attorneys of the country will hold that one package is an infringement of another one, and another attorney just as good will hold that it is not, and do so in good faith; and that is the situation which would be created by this law unless you can frame it in some language that will involve the question of good faith on the part of the manufacturer.

Mr. Williams made the statement here that no honest manufacturer, as I understood him, was opposed to this law.

Mr. WILLIAMS. I did not say that. I said that no honest manufacturer should worry.

Mr. LANNEN. Should worry. Well, we are worrying. I represent several thousands of honest manufacturers who are worrying about this proposed amendment.

Mr. WILLIAMS. I did not mean to question the honesty of your clients.

Mr. LANNEN. We are worrying, and we are worrying very much about this bill, and the gentlemen who were here the other day—the candy people—came over here because they were worrying about this bill.

Now, you say the courts will take into consideration the matter of the merits of a case. I will give you a concrete case that I tried in which the courts did not take into consideration the merits of the case, because they could not take them into consideration. In a case in Boston, Mass., some years ago, against one of the leading confectioners of this country, a fine old gentleman—and there is not a better gentleman in this country, nor a more honest man—his product was charged with containing talc. The talc was used for polishing hard candies so as to make them smooth. It was used for mechanical purposes only. It gives hard candies a smooth surface so they will not stick together and will keep better and keep from sticking together, and things of that kind. It was used mechanically in big revolving pans. Confectioners have a round pan that revolves and they put the candy in there, and as that candy rubs against the sides, which are waxed with beeswax or some other harmless wax, it has the effect of polishing the candy nicely. This manufacturer put a little talc in there, just a small amount, probably three finger tips full to 150 pounds of candy. That left minute particles of that talc on the outside of the candy.

You gentlemen understand what a grain is. A grain is ordinarily about the size of a grain of wheat. That is where the word "grain" came from originally. They used in the early days to weigh things with wheat grains, so a grain is about the size of a grain of wheat. Now, the amount of talc involved in this case, as I remember, was a fraction of a grain to a pound of candy. I am not sure that is the fact, because I have not the facts before me, but as I remember it now there was a fraction of a grain scattered over the surface of a pound of candy. This food law provides that an article of confectionery shall be deemed to be adulterated if it contains, among other things, talc. The Government proved that the product contained talc in the amount that I told you. I made the contention that the law was not aimed at that kind of a proposition, but that what the law was aimed at was fraud and deception, where a man put in talc or some other mineral in the candy to increase its weight and defraud purchasers.

The lower court judge took that same view. We tried the case before a jury of 12 men in the United States court. We won the case before the lower court and the jury. The Government appealed the case to the United States Circuit Court of Appeals in Boston, and the case was reversed by the United States Circuit Court of Appeals and sent back, for the very reason that the judge in the lower court

took the position that he did. From that day to this the use of talc in polishing candy has been discontinued in the United States to the detriment of the entire confectionery industry. There has never been a substitute found that will do the work that the talc will do; and I think that Dr. Alsberg will tell you that there was no wrong done and no harm done in that particular case, but the court was confronted with a law that it could not get around and said, "Congress has said that if it contains talc it is illegal, and the Government has shown that it does contain talc."

Incidentally, talc never was used to make weight in candy or anything of that kind, never in the history of the candy industry.

The history of that particular provision of law is this. There were two manufacturers in a certain city years ago manufacturing hard candies, and one manufacturer discovered that by putting in a little pinch of talc he could polish his goods a little better than anybody else. His competitor found that out, and so, when they were passing one of the earlier food laws, in the States, that competitor went to the legislature and put in the provision that candy should be deemed to be adulterated if it contained talc. Confectioners went along for many years, 25 years or more, and never paid any attention to it until the Government brought that case in Boston under a similar provision in the national law, and the man was convicted and his name published to the country as a criminal, or a violator, at least, of the national food law, for that harmless and innocent act.

We want to prevent things of that kind in the future, gentlemen.

Mr. McLAUGHLIN of Michigan. Is it customary to permit an appeal in a case where the verdict is not guilty?

Mr. LANNEN. It was a seizure case. That was a proceeding in rem against the goods themselves, and in that case the Government has the right of appeal. And while you are speaking about that, I want to tell you something about this proposition of having to try a case in different districts, because I have had some very sad experiences along those lines.

When the Department of Agriculture comes here and makes the plea to you about this difficulty of having to try cases in different districts, I tell you they are leaving a wrong impression. I think it is the manufacturer that has to complain about that, not the Government.

Mr. WILLIAMS. We have not complained about having to try cases in different districts.

Mr. LANNEN. You told the committee here that one of the difficulties in regard to the proposed amendments to the bill would be that you might have to try cases in this district and that district, etc., to get court decisions as to certain things in the bill, etc.

Mr. CANDLER. I made that suggestion.

Mr. LANNEN. Pardon me. Now, the situation is this, that it is the manufacturer that is forced to defend his product and himself in different districts in the United States. He is forced to go sometimes thousands of miles away from where he lives, to a strange court and a strange district, and defend his goods; and after he has successfully defended his goods in that particular court in that district, often at great expense, he may have, as soon as he gets home, have to go and again defend the same goods in some other court, probably a thousand miles away from home, among strangers.

Mr. CANDLER. I made that suggestion, if you will pardon me, in reference to the construction of the language you suggested putting into this bill, that no one could tell what the judicial construction of that language might be, and that one jurisdiction might construe it in one way, and another jurisdiction might construe it in another way, and I was in favor of the idea of the department to put language in it that had already been judicially construed, so you would know what it meant when it went into law.

Mr. LANNEN. I am in favor of that. I am in favor of making this law so definite that anybody will understand what it means.

Mr. CANDLER. In that connection I suggested as an illustration the fact that one jurisdiction, in reference to the migratory bird laws, had held it unconstitutional, and another jurisdiction had held it constitutional, and we did not know what the law was in this jurisdiction by reason of that fact.

Mr. LANNEN. I will give you another illustration. Some years ago a manufacturer's goods were seized down in San Antonio, Tex. The manufacturer lived in Chicago. He had a large trade in that part of the country. It was necessary for him to go down and defend his goods. He employed an expert at $100 a day, and took him down to San Antonio, and he also took me down there to try the case, and he engaged a firm of attorneys down there, the firm of Denman, Franklin & McGowan, among the best attorneys in the State. Denman was on the supreme court of Texas for a number of years.

We waited around the hotel for several days, and finally the case came on for trial, and we won it. We had no sooner gotten back to Chicago than another case of the same goods, as I remember it, labeled in the same way, was seized at another place in Texas, over at Houston, as I remember it, and the manufacturer came to me and said, "What are we going to do? I have already spent $4,000 or $5,000 in going down there and trying that case. Must I spend $4,000 or $5,000 more to go down there and defend myself again? That is a practical illustration.

I will give you another illustration. There was a shipment of goods made from Brooklyn, N. Y., a few years ago, to St. Louis. The Government seized the goods in St. Louis, and the case was brought into Judge Dyer's court. I went down there and tried that case. That was a proceeding in rem, and the court held that the thing itself was not adulterated or misbranded; but after that the manufacturer in Brooklyn was forced to pay a fine of $100 for having shipped that product, after the Federal court in St. Louis held that the article was legal.

Mr. MCLAUGHLIN of Michigan. Who imposed that penalty?

Mr. LANNEN. One of the district courts in New York.

I will say, in justice to Dr. Alsberg, that the condition at the present time is not like it was some years ago. He has tried to be fair in matters of that kind, as far as he can; but when it comes to arguing the principle involved, I want to say that the manufacturer is the one that has the complaint about trying cases in different districts, and not the Government.

Now, gentlemen, in regard to good commercial practice, we all know, as attorneys, at least, that good commercial practice has been resorted to in trying cases in every State in the Union. When a question arises as to what is the standard for goods sold, or what a

trade custom is as to selling goods, the courts have looked to trade custom—such as to establish what a bushel of wheat is. That has always been the custom of the courts of this country in the absence of specific statutes.

Mr. WILLIAMS. Is there not a difference between established custom and what might be considered in some men's minds to be good commercial practice?

Mr. LANNEN. Well, I was going to suggest an amendment to make it read, "Well established and well recognized good commercial practice."

Mr. MCLAUGHLIN of Michigan. Suppose there was a case like this, where the trade all agreed to a certain practice, and they all followed it, but it was unfair and perhaps fraudulent as to all of them; what would you say?

Mr. LANNEN. I would say that that assumes that every food manufacturer in the United States is a dishonest man, and I deny it.

Mr. MCLAUGHLIN of Michigan. Many of these gentlemen come here saying that they put a third or a quarter of the full amou t of potato chips in that package, and that they all do it. Do you justify it?

Mr. LANNEN. Let me ask a question about that particular package.

Mr. MCLAUGHLIN of Michigan. Was that justified?

Mr. LANNEN. I did not hear anybody say that they all did it. Dr. Alsberg, do you know whether there were any other of those packages found in this market?

Mr. ALSBERG. I do not know about those potato chips. That is an article of rather limited sale, but it is a fact that not very long ago the slack filling of small packages of spices was universal, and the manufacturers admitted it was universal till the Bureau of Chemistry stepped in. Before the war it was very widespread, but not universal, and during the war it became universal; but now the packers are going back to fully filled packages.

With reference to the potato chips, I do not know. That is an article of which there is not a very large sale.

The CHAIRMAN. One of the candy manufacturers testified that he was forced by the trade to use a false bottom.

Mr. LANNEN. Yes; and that has been discontinued. I am not defending that. We have been fighting that in the trade harder than Dr. Alsberg has. We do not stand for that.

Now, then, it seems to me that Mr. Williams has not conceded anything here that has been suggested. There have been some very reasonable suggestions made here, it seems to me. If you will simmer it down, his proposition is this, as I understand it, that he would deny to anybody the right of trial in court and have you frame this law so the department can enforce what they consider to be the law, or what they think the law ought to be, without giving a man a trial in court.

Mr. MCLAUGHLIN of Michigan. Do you mean to say that there is something in here that would forbid your client a trial in court?

Mr. LANNEN. No; but you are trying to have the law so framed, according to the amendment, that it would eliminate court trials.

Mr. WILLIAMS. My dear friend, I have told you that this procedure would give a man the right of jury trial, and he would not get it under the Federal Trade Commission act. How did you get that?

Mr. LANNEN. Not a jury trial, but only a trial before a jury. What is the good of giving a man a jury trial in court if you make the law so strict here that he has not any defense? That is the point I am making. What is the use of a candy manufacturer going into court——

Mr. CANDLER. Let him obey the law, and he will not need to make any defense.

Mr. LANNEN. That raises a question of what the law is. Obey a reasonable and sensible law; yes. An analogy would be that there would not be any murders committed or any robberies committed at night if you passed a law to provide that every citizen must be locked in his home at night and not permitted to walk about.

Mr. MCLAUGHLIN of Michigan. Even in criminal cases, where its is necessary to prove intent, is it not held that a man is held to have intended the reasonable consequences of his act?

Mr. LANNEN. Yes; that is true to a certain extent.

Mr. MCLAUGHLIN of Michigan. Now, they put out a package that will absolutely deceive.

Mr. LANNEN. Yes.

Mr. MCLAUGHLIN of Michigan. That is the result and effect of the use of such a package.

Mr. LANNEN. I am not defending that package.

Mr. MCLAUGHLIN of Michigan. Would it be necessary and proper to go back and find out what was in the mind of the man who made that if the absolutely uniform and inevitable result of what he had done led to deception?

Mr. LANNEN. No, Mr. Congressman; that is what led me to suggest the amendment that I did this morning.

Mr. MCLAUGHLIN of Michigan. If I am wrong about that, tell me wherein I am wrong, and I will listen to you.

Mr. LANNEN. You are not wrong; you are right, Mr. Congressman.

Mr. MCKINLEY. Did he not say in his suggestion here on the bottom of page 3, "if it evidences a fraudulent intent"?

Mr. MCLAUGHLIN of Michigan. That takes it back to the intention that was in the mind of the manufacturer.

Mr. MCKINLEY. No; if it evidences a fraudulent intent.

Mr. MCLAUGHLIN of Michigan. I did not notice that Mr. Lannen was disposed to accept my suggestion of an amendment there, and I gathered that he insisted on such words as would make it necessary to prove the intent of the manufacturer.

Mr. LANNEN. Well, I said this, that I agree with you. I said that if the word "calculated" will catch fraud and not catch the innocent man, then I agree with you, but when it comes to the point where the Government can convict a man on some mere quibble, regardless of fraud, or anything else, and regardless of any real harm done to a purchaser, I object; and they could do that under this law as it is drawn now, just as they got the candy man under the law, in Boston, for a mere quibble.

Now, I want to guard against that, I want to guard the honest manufacturer, and I do not want to defend the crook, and I ask you to draw the law so that it will not enable the Government to convict a man for a mere quibble.

Mr. MCLAUGHLIN of Michigan. I do not want to have any law written that will embarrass or permit of embarrassment to any

honest dealer carrying on his legitimate trade. I do not believe in Government ownership or Government control, or Government interference with business, or in any exercise of control over business, unless it is absolutely necessary, but it seems to me that when the trade puts a package or a product onto the market in such a form that people would naturally be deceived, then I think the practice itself ought to be tried, and not the man himself.

Mr. LANNEN. I agree with you fully and absolutely. There is no difference of opinion between us on that.

Now, I will say this, that if you want, I can send you notices of judgment sent out by the United States Agricultural Department, stating the facts in cases that have been tried where the defendant has been convicted, send you many of them, that will convince you that cases have been brought by the Government repeatedly, and men fined, usually by default, for mere quibbles or mere trifles or frivolous things, absolutely frivolous in the mind of any reasonable man. I will send you those notices of judgment as soon as I can get time to get the data together if you want them.

Mr. CANDLER. An individual case might appear to be frivolous, but the collective cases might be very important. Sometimes it is necessary to bring a case in reference to a matter of seemingly small importance, in order to determine what is necessary in order to protect the general public.

Dr. ALSBERG. Mr. Chairman, in that connection, may I advert to this talc polishing case which Mr Lannen has described? I think Mr. Lannen has stated the facts so far as he has them, absolutely correctly. I think what he stated about this very small amount of talc that is present in the candies is correct. That it is harmless is also correct. The case was brought originally—and I am speaking about this because it all happened before I was Chief of the Bureau of Chemistry, and I personally had nothing to do with it—the case was brought because the law specifically prohibits talc in confectionery, as it specifically prohibits alcohol and a number of other materials in confectionery. The Department at that time felt that this was a specific instruction on the part of Congress that no talc shall be used, and that there was no discretion so far as the department was concerned, since the law was absolutely specific on the point.

The case was brought, and it was lost. was it not, by the Government in the lower court?

Mr. LANNEN. Yes, sir; the jury found in our favor. and so did the judge in the lower court.

Dr. ALSBERG. The department wanted to take it to the higher court because it wanted to get the question settled by the circuit court so that it would have definite instruction from the court as to the interpretation of the law. The case was appealed. I believe, either before or just about the time I came into the bureau. and we were all very much astonished that the Circuit Court of Appeals reversed the decision of the lower court. It did so because the law is absolutely specific on the subject. The matter is trivial. the matter is unimportant. but the law is specific on the point. and the department has no discretion in the matter. It hoped to be given discretion by having the judgment of the lower court affirmed by the circuit court. but the circuit court did not take the same view as the lower

court, and the only way in which the matter can be handled at the present time is by amending the law as it now is, and striking out the prohibition of talc in confectionery in the law.

Mr. WILLIAMS. At the time we appealed that case was there not also some question as to the use of other minerals in candy?

Dr. ALSBERG. The provision of the law under consideration involves the use of mineral matter in candy, and enumerates what at that time were believed to be objectionable mineral substances in candy. Talc is one of them. I agree with Mr. Lannen in everything he says, but I wish the committee to understand that while it is a trivial matter it has been specifically acted on by Congress, and we have not any discretion in the matter. There are other mineral substances that we are not objecting to. For instance, as Mr. Lannen knows, in the industry he is representing it is customary to work hard-boiled candies on a slab of marble while they are hot, in shaping them into sticks, and so on. Candy makers are using mineral oil to lubricate the slab. The amount of mineral oil that gets into the candy is negligible and harmless, and we are not objecting to its use. There is no specific provision in the law covering this practice, but this talc matter is different. The law says there shall not be any talc, and the courts have said we have not any discretion in the matter.

Mr. CANDLER. The law says you can not use any talc at all of any kind.

Dr. ALSBERG. That is the question.

Mr. MCLAUGHLIN of Michigan. It is a very difficult matter to define different grades of crime by law. Under the common law there are many crimes in which there are no grades. There are no grades in the crime of assault and battery. If I touch a man like that [indicating] without any right to do it, it is an assault and battery, just the same as if I struck a blow sufficient to knock a man down. There are no grades in it, and I think it would be very difficult to write into a statute different grades of some of these alleged offenses.

Mr. LANNEN. You would not say, Mr. Congressman, that if you touched a man like that in a friendly way, it would be an assault and battery? It would have to be with malicious intent.

Mr. MCLAUGHLIN of Michigan. If Mr. McKinley did not wish me to touch him, I would have absolutely no right to do so, and if I did, it would be an assault and battery.

Mr. LANNEN. There would have to be some malice shown even in that instance, as I understand the law.

The CHAIRMAN. Is that all you desire to say, Mr. Lannen?

Mr. LANNEN. Just this in regard to Dr. Alsberg. We do not want to put his department in the position again where he will have to prosecute innocent products, and where he will have to prosecute a just and innocent man or prosecute a package because it may mislead the housewife in an innocent way, without any harm being done. That is the point I want to make.

The CHAIRMAN. The committee is very grateful to you, gentlemen. This will conclude the hearings on H. R. 8954. We will now hear Mr. Bee on another matter. In the morning the committee will meet at 10 o'clock to take up the proposed amendments to the pure food and drugs act.

(Thereupon the committee proceeded to take up a different matter.)

FRIDAY, OCTOBER 31, 1913.

The committee met, considered H. R. 8934 in executive session, and instructed the chairman to reintroduce the bill as amended by the committee, and report the same favorably to the House.

(The amended bill is as follows:)

[H. R. 10311, Sixty-third Congress, first session.]

A BILL To further amend section 8 of an act entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June 30, 1906, and amended by the act approved March 3, 1913.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8 of an act entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June 30, 1906, and amended by the act of March 3, 1913, be, and the same is hereby, amended in the following particulars:

(1) By striking out the period at the end of paragraph "Second," in said section 8, in case of foods and inserting in lieu thereof a semicolon, and adding the following clause: "or if it be in a container so made, formed, or shaped as likely to deceive or mislead the purchaser as to quantity, quality, size, kind, or origin of the food therein,"

(2) By adding at the end of section 8, in case of food, as amended, a new paragraph, as follows:

"Fifth. If in the package form, and irrespective of whether or not the quantity of the contents be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, as provided in paragraph "Third" of said section 8 as amended, the package be not filled with the food it purports to contain: *Provided, however*, That reasonable variations and tolerances may be established by rules and regulations made in accordance with the provisions of section 3 of this act."

Provided, however, That no penalty of fine, imprisonment, or confiscation shall be enforced for any violation of the provisions of this amendment as to domestic products shipped in interstate commerce or sold or offered for sale in the District of Columbia or in the Territories of the United States prior to or within six months after the enactment hereof, or as to products imported prior to or within six months from the enactment hereof: *And provided further*, That nothing in this amendment shall affect or be construed to affect any violation of the food and drugs act of June 30, 1906, as heretofore amended, or impair or be construed to impair any right of action or remedy thereunder.